

Order under Section 69
Residential Tenancies Act, 2006

File Number: TSL-29998

I hereby certify this is a true copy of the Order
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In the matter of: 206, 44 Huntley St
Toronto ON M4Y 2L1

Between: Mercedes Homes Inc.

FEB 09 2011

Landlord

and

James Carter

Landlord and Tenant Board

Tenant

Mercedes Homes Inc. (the 'Landlord') applied for an order to terminate the tenancy and evict James Carter (the 'Tenant') because he, another occupant of the rental unit or someone he permitted in the residential complex has wilfully or negligently caused undue damage to the premises. The Landlord has also applied for an order requiring the Tenant to compensate the Landlord for the damage; and because he, another occupant of the rental unit or someone he permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant. The Landlord also claimed compensation for each day the Tenant remained in the unit after the termination date.

This application was heard in Toronto on May 6, 2010, July 13, 2010, October 19, 2010 and January 17, 2011. The Landlord's representative Harry Fine and the Tenant attended all hearings. The Tenant was represented by Fiona Lee at the first two hearings and by Jack DeKlerk at the remaining hearings.

Jennifer D'Addario, the managing director and president of the Landlord ('Witness 1'), Kevin Shanahan, who works for Magical Pest Control (referred to as 'M Co') ('Witness 2'), and property manager Sherle Pero ('Witness 3') testified for the Landlord. The Tenant testified on his own behalf.

All of the reasons for this order follow and no further reasons shall issue.

Determinations:

Evidence

1. The residential complex containing the rental unit has a total of 26 units, is located in downtown Toronto and was purchased by the Landlord in 2009. The Tenant has lived in the rental unit for twenty years.
2. An understanding of the sequence of events leading to, and occurring after the application was filed is significant in the circumstances and is therefore set out below.

3. In July, 2008 the Landlord received a complaint from the tenant residing directly above the rental unit complaining of bedbugs. The Landlord therefore contacted its pest control company, M Co, who attended and treated the unit and those around it in what is known as a "block treatment." The rental unit (as in the unit occupied by the Tenant) was not treated because it was not prepared in accordance with M Co's instructions given to the Tenant in advance. The person who attended for M Co wrote verbatim in their report that the rental unit "need good house keeping" and "no space walk inside."
4. Then, a year later, the Landlord received more complaints of bedbugs. Witness 1 testified a number of tenants started vacating the residential complex as a result, and the Landlord had M Co begin treatments again.
5. The day before the treatment of the rental unit in June, 2009, Witness 3 inspected the rental unit on behalf of the Landlord. Her evidence in her notes and confirmed at hearing indicated "100% of the floor was covered with clothes and things," that she could not walk in the kitchen "because of clothes and boxes," that "the dresser was piled 3 feet high with papers and clutter," that "we could not get into the washroom, because of the sleeping area that was covered bedding and clothes," that a window sill was 85% covered with an unstable pile of books and that "the apartment was disgusting and not livable (sic)." M Co also noted the condition of the rental unit the next day, saying it had not been properly prepared noting that the Tenant's mattress was infested with bedbugs.
6. Following that inspection and treatment, the Landlord wrote to the Tenant echoing Witness 3 and M Co's observations and enclosing a free laundry card for the Tenant to launder his clothing. It then wrote on July 27, 2009 that the Landlord had arranged for a treatment on July 30, 2009 that would be more extensive, involving "fogging" of the rental unit. This would also involve M Co preparing the unit and laundering the Tenant's belongings, returning them to him later. Four other units were also to be treated on that occasion.
7. As a result of that treatment, M Co recommended the disposal of the Tenant's mattress and box spring and there was a suggestion the mattress was not bagged as it was dragged away to be disposed of. Two adjacent units were treated the week after.
8. A full building treatment then took place on August 11, 2009, where M Co observed that the rental unit was 70% prepared. The day after, Witness 3 entered the rental unit and noted the following: "85% of the floor was still covered with boxes and clothes that were all in plastic bags...blankets and clothes were scattered around the floor, empty wine...and...beer bottles in the sleeping area...the window was still in the same condition as my first visit, piled high with papers an (sic) clutter...(and) we still could not access the kitchen or bathroom because of clutter."
9. A follow-up treatment took place on September 4, 2009 in conjunction with treatment over the period a week of other units in the residential complex. M Co's report from that day indicated there was no evidence of bedbugs.
10. Two inspections then took place, the second preceding the Landlord's next treatment on October 15, 2009. After the first, the Landlord wrote to the Tenant indicating that M Co

had pinpointed the rental unit as the source of this persistent issue, which was also the conclusion of Witness 2. The Landlord complained the Tenant had never reported the presence of bedbugs to the Landlord and that, despite four treatments, there was still evidence of bedbugs in the rental unit. It went on, saying "this is your notice that your apartment must be cleaned up further, and put in a habitable state. All your clothes must be laundered. You must remove furniture and items permanently. There has to be room to move around in your apartment. The current situation is not acceptable." At the treatment on October 15, 2009, M Co wrote they noticed bedbugs and improvement in the state of the clutter, "however needs more attention (sic)."

11. As a result, the Landlord wrote to the Tenant again, saying they had arranged for specialized laundering and would provide the Tenant with strips to put into his books that had to be bagged.
12. On October 16, 2009 Witness 3 again visited the rental unit and was refused entry by the Tenant despite advance notice. Witness 3's notes from that visit indicated that from the door she could view that the window sill remained piled high (in her words "85% covered") as was the Tenant's dresser, and that "the floor was cleared slightly of things, boxes and things were pushed to the walls."
13. At that point the Landlord began making offers to the Tenant to vacate the rental unit and tried to assist the Tenant in locating alternative accommodation. Witness 3 wrote to the Tenant, summarizing events to that date, offering support, and requesting a meeting "to devise an accommodation plan that will allow you to clean up the unit within a reasonable amount of time," failing which the Landlord would serve notice to terminate. Letters followed, one of which requested information about the cleaning company which was retained by the Tenant and which cleaned the rental unit on November 24, 2009. Notice of termination of the tenancy (N5) followed on December 31, 2009.
14. Prior to service of the N5, on either November 25, 2009 or November 27, 2009, but certainly after the cleaners assisted, Witness 3 entered the rental unit to take photographs which were relied upon at the hearing, along with notes that accurately summarized what I observed in the photographs. Specifically, the photographs showed a great deal of clutter in the bedroom area and slightly less clutter on the dresser and window with no other serious concerns in the rest of the rental unit. Improvements were noted however in subsequent photographs taken on December 1, 2009, especially in the bedroom. M Co's notes from a treatment on November 30, 2009 noted 90% "percentage of completion" that day. On the other hand, Witness 2 testified that one of the units next to the rental unit had not been prepared properly, where M Co's notes said it had been prepared "less than 50%".
15. The Landlord entered without notice on January 15, 2010, two weeks after service of the N5 and took essentially two photographs before me. Witness 3 testified, and I find that one of the photographs shows considerable disarray and clutter in the sleeping area of the rental unit, with clothes strewn everywhere. Witness 3 testified she also saw dishes and bottles scattered around the unit.

16. The hallways of the residential complex were then treated on January 29, 2010 and a full treatment of the residential complex took place shortly after, on February 9, 2010. M Co's notes from that visit indicated 70% preparation of the unit, that dresser doors had not been emptied and that clothes had not been bagged. The notes went to say "this must (sic) need a hygiene cleaning all dead bedbug were found along the baseboard. Tenant must prepare as per preparation sheet," which were provided to the Tenant throughout. Another treatment of the rental unit on March 10, 2010 similarly noted that that the closet and dresser had not been emptied, and on March 22, 2010 the Landlord contracted M Co to treat and prepare the rental unit again after buying the Tenant a new sleeping bag and pillows.
17. In April, 2010 the evidence before me was that the Landlord laundered the Tenant's items an additional time and arranged for a further treatment of the rental unit on April 14, 2010 where the rental unit was fully prepared. At that point there was (and remains I was told) no evidence of bedbugs.
18. The Landlord claimed reimbursement of all its expenses related to the ongoing infestation of the rental unit and residential complex on grounds the Tenant's failure to comply with the Landlord's instructions and cooperate with the Landlord were the causes of the problem. The total amount claimed was \$7,302.68. That the Landlord incurred these expenses was not an issue and the Landlord's request to amend the application seeking additional expenses it incurred after the application was filed was not substantially opposed by the Tenant at the first hearing.
19. The Tenant testified that his sole source of income since 2003 has been Canada Pension Plan Disability and that he suffers from constant pain that prevents him from working and from remaining still for any period of time. He further testified that as a result of the events leading to this application he has disposed of many of his belongings but that apart from clothes, barebones furniture and a television set, he owns a number of books he stores on the window sill and on a desk. He testified (and it was not contested) that the rental unit is now in significantly better condition than it was when the photographs relied on by the Landlord were taken on November 25, 2010.
20. The Tenant testified that he had no understanding of bedbugs when they first appeared at the rental unit and that his life was turned upside down by them. He testified that his pain impeded his ability to follow the Landlord and M Co's instructions but that he does not like asking for others for help having lived independently for many years.
21. The Tenant testified that after receiving the notice of termination he complied with paragraph 31 of the N5 in that he uncluttered the bedroom area and put all of his clothes in the bathtub to get them out of the way for the next treatment.

Analysis

22. There were two grounds of the application: that the Tenant wilfully or negligently caused undue damage to the premises and that the Tenant substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant. It was not argued by the Landlord that the Tenant was responsible for bringing

bedbugs to the residential complex, rather than the Tenant's failure to cooperate with the Landlord was the cause of the continuing problem.

23. Counsel for the Tenant put forward a number of arguments as to why I should dismiss the application on both grounds.
24. On the wilful and negligent grounds it was argued that none of the Tenant's actions amounted to wilfulness or negligence. On the former, I find it arguable as to whether the Tenant was wilful in his actions. Although it was conceded he was not cooperative at the outset in 2008, I do not agree with the submission that after that time he was cooperative with the Landlord's requirements. In fact, there are several instances in evidence when the Tenant did not prepare the rental unit as required by the Landlord and M Co. I would accept however that the Tenant might not have been in a position to comply fully because of his physical limitations (and it was not argued the *Ontario Human Rights Code* applied) and that he might not have understood, at least at the beginning, the scale of the problem. I am not convinced to the extent necessary that the Tenant was wilful or deliberate in inflicting the damage claimed by the Landlord.
25. On the other hand, I find negligence to be made out in the Tenant's action or inaction. The Tenant failed to cooperate with the Landlord, not just on the first occasion when he did not understand the problem, but many times subsequent despite the Landlord's attempts to assist him. The Tenant's lawyer framed the question properly: was it negligent for the Tenant not to have gotten help sooner? I find it was, that the Tenant consistently ignored the Landlord's instructions and that he did not cooperate with the Landlord as requested. The examples are numerous: prior to the treatments in June, 2009, August 2009, October, 2009, November, 2009, February, 2010, March, 2010 and in the Tenant's refusal to allow the Landlord's representatives entry in October, 2009, despite notice.
26. It was further argued that there was no evidence to support Witness 2's position that the rental unit was the cause of the larger problem in the residential complex, and that M Co itself might have brought bedbugs to the rental unit. As to the first argument, I cannot agree that the evidence before me supports on a balance of probabilities the conclusion the Tenant was the cause of the larger problem for two reasons. First, though Witness 2 appeared entirely convinced the Tenant was the cause of the larger problem, a review of the documentary evidence before me shows that might not have been the case; on many occasions surrounding units were also not fully prepared where M Co's documents indicate in most cases that units were 70%-80% prepared. Moreover, in November, 2009, the documentation regarding two other units on the same floor indicated preparation of less than 50%. The Tenant's lack of cooperation may have contributed to the wider issue but I cannot find he should be held solely responsible for it. Second, the issue of the infested mattress that was moved out of the rental unit was not fully explained and it is, at minimum, a possibility its removal exacerbated rather than resolved the issue.
27. Although it was argued the Tenant voided the N5 by complying with the notice, after reviewing the evidence I would find the argument was actually that the Landlord had no evidence to show that the Tenant did not comply with the notice within the seven days

allowed by the N5. While the observation that there was no evidence of compliance or non-compliance within the seven day period was correct, the conclusion was not.

28. As noted above, the N5 was served on December 31, 2009 and the next entry was on January 15, 2010 when Witness 3 took the photograph described above. To have complied with the N5, and specifically paragraph 31 of the N5, the Tenant would have had to "clean up the sleeping area to un-clutter the area to allow for proper treatment of the unit." Is it plausible that the Tenant complied with the N5 within the seven day period then allowed it to degenerate back to the condition shown in the photograph? I think not and find it significantly more likely the Tenant simply did not comply with the notice despite his testimony at the hearing. I also find the fact the Landlord had no spraying scheduled until February, 2010 to be insignificant as the requirement was that the rental unit be put in a condition to allow for treatment, not that it would be treated. The case relied upon by the Tenant, *Luray Investments Ltd. v. Recine-Pynn*, [1999] O.J. No. 3643 is distinguishable, because in that case there was evidence the conduct ceased was not considered by the Ontario Rental Housing Tribunal (as the Board was then known), where here I find there to be sufficient evidence the Tenant did not comply with the notice.
29. It was argued the Tenant should not be liable for what the Landlord was claiming because it was never demanded of him. I disagree: the Landlord's letter dated April 9, 2010 and the N5 indicated the Landlord would hold the Tenant responsible.
30. I would also find substantial interference with the reasonable enjoyment of the Landlord but not other tenants in the residential complex in the Tenant's failure to comply with the Landlord's requests for preparation. I find this to be the case even accepting the Tenant's definition that "substantial interference" as the term is used in the Act amounts to "unlawful interference with contractual relations." The Tenant's failure to comply with the Landlord's reasonable requests in essence hindered the Landlord's ability to comply with its contract with the tenants of other units, many of whom I find moved out, to provide units in good state of repair as required by section 20 of the Act. This is the same conclusion as arrived at by Divisional Court in paragraph 10 of *Morguard v. Peters*, 2010 ONSC 2550, where the court found "the Landlord has a lawful interest in protecting itself against future claims by (the tenant)...or other tenants based on a failure to comply with section 20 of the Act. Accordingly, the Member's determination of substantial interference with a lawful interest of the Landlord was reasonable."
31. Therefore, I find that the Tenant negligently caused undue damage to the rental unit and that he substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord. I also find proximity between the Landlord's claim for damages and the cause of action in the application. The Tenant should therefore be liable to the Landlord for the amount sought related to the rental unit only (\$3,081.66) and the filing fee of \$45.00 less \$278.25 for the first treatment which I find should be the Landlord's responsibility.

Section 83

32. In balancing the fairness of the situation it exists now, I find that weight should be placed on the fact that the problem leading to the application has been resolved. I would also place weight on the Tenant's evidence as to the impact the events leading to the application have had on his life and that he has no more of an interest in seeing the return of bedbugs than the Landlord. In addition, although not necessarily part of the fairness test set out in section 83 of the Act in the Landlord's submission, I find I should take into account the Tenant's circumstances regarding his health and his finances. In view of these circumstances, I find it likely that it may take the Tenant some time to find and move to alternative accommodation.
33. On the other hand, because of systemic delays in the scheduling of hearings in this matter, a significant period of time has elapsed since the time it first came to the Board and the date of this order. Also, I would agree with the Landlord that the test is not whether the subject matter of the application has been resolved, but rather whether the Tenant complied with the N5 preceding the application on the valid grounds set out.
34. I find on balance that the eviction should be postponed to March 31, 2011, which will allow the Tenant time to find alternative accommodation and potentially source resources in the community that might assist him in locating new housing. Given my earlier comments as to the likelihood of a recurrence of the issues leading to the application, at least as far as the Tenant's behaviour is concerned, I find the relatively lengthy extension to likely have little prejudicial effect on the Landlord.
35. Therefore, having considered all of the disclosed circumstances in accordance with subsection 83(2) of the Act, I find that it would not be unfair to postpone the eviction until March 31, 2011 pursuant to subsection 83(1)(b) of the Act.

It is ordered that:

1. The tenancy between the Landlord and the Tenant is terminated. The Tenant must move out of the rental unit on or before March 31, 2011.
2. The Tenant shall pay to the Landlord \$2,803.41, which represents the reasonable costs of costs incurred by the Landlord as a result of the Tenant's actions.
3. The Tenant shall also pay to the Landlord \$45.00 for the cost of filing the application.
4. The Tenant shall also pay to the Landlord \$21.79 per day for compensation for the use of the unit from April 1, 2011 to the date he moves out of the unit.
5. If the Tenant does not pay the Landlord the full amount owing on or before February 11, 2011, he will start to owe interest. This will be simple interest calculated from February 12, 2011 at 2.00% annually on the balance outstanding.

6. If the unit is not vacated on or before March 31, 2011, then starting April 1, 2011, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
7. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlord on or after April 1, 2011.

February 9, 2011
Date Issued



Jean-Paul Pilon
Member, Landlord and Tenant Board

Toronto South Region
2nd Floor, 79 St. Clair Ave. E
Toronto ON M4T 1M6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

In accordance with section 81 of the Act, the part of this order relating to the eviction expires on September 30, 2011 if the order has not been filed on or before this date with the Court Enforcement Office (Sheriff) that has territorial jurisdiction where the rental unit is located.