

CITATION: Montgomery v. Van, 2009 ONCA 808
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COURT OF APPEAL FOR ONTARIO

Laskin, Juriensz and Rouleau JJ.A.

BETWEEN

Lindsay Montgomery

Plaintiff (Appellant)

and

Duc Van

Defendant (Respondent)

Derrick M. Fulton, Kyle T. H. Smith, for the appellant

Alan L. Rachlin, for the respondent

Heard: June 29, 2009

On appeal from the order of Justice J. Kelly of the Superior Court of Justice dated January 16, 2009, with reasons reported at 306 D. L. R. (4th) 521.

Juriensz J.A.:

[1] Regulations under the *Tenant Protection Act*, 1997, S.O. 1997, c. 24¹ (the “Act”) place the responsibility upon the landlord to ensure that accumulations of ice and snow are removed from exterior common areas. This appeal concerns the validity of a

¹ This Act was repealed on January 31, 2007 and replaced by the *Residential Tenancies Act*, 2006, S.O. 2006, c. 17.

provision in a tenancy agreement that provides that the tenant shall be responsible for snow removal. The landlord relies on the provision in his defence against the tenant's negligence action.

Factual Background

[2] The appellant tenant commenced an action against a respondent landlord for damages after slipping and falling on the premises. In her claim, the tenant pleads that on January 30, 2003 she slipped on ice on the walkway leading to her basement apartment and suffered injury. In his defence the landlord pleads that the Conditions of Lease (the tenancy agreement between the parties dated July 7, 2002), provides that: "Tenants are responsible for keeping their walkway and stairway clean (including snow removal)." Based on this provision, he pleads further that the tenant's injury was due to her own negligence in that "she failed to keep her walkway in a state of good repair, including free from snow and ice".

[3] The landlord brought a motion to determine before trial the question of law whether the provision of the tenancy agreement is void because it is inconsistent with the Act. Taking the position that the provision is void, the tenant brought a cross-motion to strike out the paragraphs in the statement of defence that relied on the provision.

[4] The motion judge reasoned that it would be absurd to find that a tenant may never consent to participating in any snow removal tasks. She accepted the landlord's argument that "landlords may fulfill their statutory obligations by delegating snow

removal tasks to others”. She concluded that “the Act and associated regulations do not state that snow removal tasks may never be assumed by a tenant and, as such, the Conditions of Lease executed by the Tenant are not inconsistent with the Act and should not be considered to be void.” She granted an order that the tenancy agreement provides that “the Tenant will complete snow removal tasks with respect to the stairwell area is not inconsistent with the Act.” She dismissed the tenant’s cross-motion.

The Statutory Framework

The Act

[5] Sub-section 2 (1) and section 16 of the Act provide:

2.(1) This Act applies with respect to rental units in residential complexes, despite any other Act and despite any agreement or waiver to the contrary.

16. Subject to section 181, a provision in a tenancy agreement that is inconsistent with this Act or the regulations is void.

[6] The exception in section 181 is not relevant. It relates to mediated settlements of matters that are the subject of applications under the Act.

The Regulations

[7] Ontario Regulation 198/98 (the “Regulations”), since revoked and replaced by Ontario Regulation 517/06, is entitled “Maintenance Standards” and prescribes maintenance standards to residential units in the circumstances defined by s. 154 (1) of the Act. It is common ground that the Regulations apply to the premises in this case.

[8] Sub-section 2(2) of the Regulations states that except as otherwise provided, “the landlord shall ensure that the maintenance standards in this Regulation are complied with.” Various parts of the Regulations deal with “structural elements”, “utilities and services” such as plumbing, electrical, heating, lighting and ventilation, “safety and security”, and “general maintenance”. Sub-section 26 (1) of the Regulations, which is under the part relating to Safety and Security, provides that:

Exterior common areas shall be maintained in a condition suitable for their intended use and free of hazards and, for these purposes, the following shall be removed:

...

5. Unsafe accumulations of ice and snow.

Analysis

[9] I agree with the observation of the motion judge that the legislation only requires the landlord to “ensure” exterior common areas are free of unsafe accumulations of ice and snow. It does not prohibit a landlord from satisfying this statutory obligation by retaining others to provide the required services. Specifically, it does not prohibit a landlord from contracting with a tenant to perform snow removal tasks.

[10] This, however, is not enough to conclude as the motion judge did, that the particular provision between the landlord and tenant in this case may be declared to be “not inconsistent” with the Act. That the Act does not prohibit a landlord from contracting with a tenant for snow removal services does not mean that every provision that addresses snow removal by a tenant is consistent with the Act. It remains necessary

to consider the import of the provision in issue and determine if it creates a contractual obligation to which s. 16 of the Act does not apply.

[11] Turning to the provision in this case, I begin by observing that, read literally, it addresses the “responsibility” for snow removal, without specifying any services to be provided by the tenant. By providing that tenants are “responsible” for snow removal, the clause clashes with the legislation that places that responsibility squarely on the landlord. Thus, if taken literally, the clause would be inconsistent with the Act and void pursuant to s. 16.

[12] I recognize, however, that the parties and the motion judge did not interpret the provision literally, but understood it to assign the task of snow removal to tenants. As the motion judge put it, the provision “indicates that the Tenant will complete snow removal tasks.” I continue the analysis on that basis.

[13] In order to be effective, a clause that provides that a tenant will provide snow removal services must constitute a contractual obligation severable from the tenancy agreement. The reason such a clause must be able to stand alone as an enforceable contract is because s. 16 of the Act voids provisions of tenancy agreements that are inconsistent with the Act or Regulations. The Act and Regulations make clear that in the landlord and tenant relationship, the landlord is responsible for keeping the common walkways free of snow and ice. Therefore, it cannot be a term of the tenancy that the tenant complete snow removal tasks.

[14] This does not mean that the landlord cannot contract with the tenant as a service provider to perform snow removal tasks. It does mean, however, that the clause under which the tenant agrees to provide such services, even if included in the same document as the tenancy agreement, must create a severable contractual obligation. The severable contractual obligation, while it cannot transfer the landlord's statutory responsibility to ensure maintenance standards are met, may support the landlord's claim over against the tenant in contract.

[15] In this case, the provision is inextricable from the tenancy agreement. It does not indicate a definite consideration for the snow removal task separate from the provision of the premises. As well, a consideration of the context leads me to conclude, it is too indefinite to create an autonomous contract for services. The tenant lives in one of several basement apartments of a multi-unit residential complex. The provision vaguely places the task of snow removal "from their walkway and stairway" on tenants jointly. It does not set out specifically what part of the complex's common walkways this tenant agrees to keep clean and does not stipulate on what schedule she should perform the joint obligation. The provision fails to define this individual tenant's task clearly enough to create an enforceable contractual obligation.

[16] Landlords cannot fulfill their statutory duty to ensure the prescribed maintenance standards are met by provisions as ill-defined as this one. As I see it, this vague provision, even reading it as did the motion judge is nothing more than an impermissible

attempt by the landlord to avoid his statutory obligations. I would conclude the provision is not consistent with the Act and is void.

Conclusion

[17] I would allow the appeal. I would set aside the order of the motion judge and replace it with an order declaring that clause 9 of the Conditions of Lease is void as inconsistent with the *Act* and striking out paragraphs 3 and 5 (a) of the Statement of Defence.

[18] Costs in favour of the tenant are fixed in the amount of \$5000.00 inclusive of disbursements and G.S.T.

“R.G. Juriansz J.A.”
“I agree John Laskin J.A.”
“I agree Paul Rouleau J.A.”

RELEASED: November 16, 2009