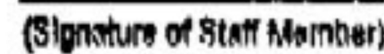
Landlord and Tenant Board

Ontario

REASONS

File Numbers:TNT-02072-IN
TNT-02088-IN
TNT-02100-IN
TNT-02090-IN
TNT-02091-IN
TNT-02098-IN

I hereby certify this is a true copy of the Order
(Name of Document)



(Signature of Staff Member)

DEC 0 4 2009

Landlord and Tenant Board

Reasons to Interim Order TNT-02072 issued on November 20, 2009, as amended on November 24, 2009 by Sylvia Watson.

The Tenants applied for an order determining that Goldshatz And Company, Jonah S Turk, Edward Todorowsky, Mary Todorowsky, and Glen Echo Park Inc 1069942 Ont Ltd (the 'Landlords'), or the Landlord's agents harassed, obstructed, coerced, threatened or interfered with them, altered the locking system on a door giving entry to the rental unit or residential complex without giving them replacement keys, substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household and

withheld or deliberately interfered with the reasonable supply of a vital service, care service, or food that the Landlord is obligated to supply under the tenancy agreement.

This application was heard in Toronto on November 12, 2009, and in Newmarket on November 18, 2009.

<u>The November 12, 2009 Hearing</u>

On November 12, 2009, K. Carnie ('KC') of the law firm of Cohen Highley LLP appeared on behalf of Glen Echo Park Inc. ('GEPI'), Edward Todorowsky ('ET'), and Mary Todorowsky ('MT').

Jonah S. Turk ('JST'), the president of Goldshatz and Company ('GC') attended the hearing on November 12, 2009 as did the Tenants.

At the November 12, 2009 hearing, KC requested an adjournment of the matter until after the review and appeals of the October 2, 2009 order in file numbers TNT-02017, TNT-02010, TNT-02024, TNT-02049 and TNT-02051 ('the October 2 order') have been disposed of.

The Tenants opposed the adjournment on the grounds that they would suffer serious prejudice if the matter were adjourned because vital services have been denied and removed, rendering their homes virtually unusable.

KC advised that she was not retained or instructed to deal with the Tenants application other than to request an adjournment. JST advised that if conditions were to be made part of an adjournment he needed time to engage legal counsel. KC advised that she could not act for JST or GC because, although her law firm is engaged by JST, GEPI, MT and ET for purposes of the review and appeals of the October 2 order, it would be a conflict of interest for her to represent JST as well as GEPI, MT and ET on these applications.

The matter was adjourned to be heard in Newmarket on November 18, 2009 in order to enable JST to retain counsel to address what, if any, conditions should be made part of an order adjourning these applications.

<u>The November 18 hearing</u>

At the November 18, 2009 hearing, J. Hoffer ('JH') of the law firm Cohen Highley LLP appeared on behalf of all Landlords.

JST and ET were present at the hearing as were the Tenants in these applications.

JH requested that I recuse myself from hearing these applications. I declined to do so.

The hearing proceeded on the question of what conditions, if any, should be made part of an order adjourning these applications.

Because of the urgency of these applications, I issued the interim order, with reasons to follow.

REASONS

Reasonable apprehension of bias

At the November 18, 2009 hearing, JH, solicitor for all of the Landlords requested that I recuse myself from hearing these applications on the grounds of a reasonable apprehension of bias because I made the decision in the October 2 order, which is under review and appeal. JH offered no case law or further argument in support of the assertion that a reasonable apprehension of bias exists because I made the October 2 order.

I declined to recuse myself.

A similar situation was considered by the Ontario Superior Court of Justice, Divisional Court in the case of *Khalter v Ontario (Labour Relations Board)* [2009] O.J. no. 3190, 252 O.A.C.261. In that case, an applicant sought judicial review of two decisions of the Ontario Labour Relations Board made by Vice-Chair Kelly Waddingham, alleging that there was a reasonable apprehension of bias because the Vice-Chair had rejected six earlier complaints that the applicant had made in a related matter. The applicant had asked the Chair of the Board to replace the Vice-Chair.
The Court rejected this ground of review saying:
"The Board was not obliged to respond to the applicant's request that another Vice-Chair be assigned to hear his complaints. A decision maker is not disqualified simply by virtue of a party having made negative allegations against her. Nor should a litigant be permitted to disqualify an adjudicator who has ruled against him simply by making complaints against her. Indeed, it was reasonable of the Board to assign the same adjudicator to cases involving similar facts and the same parties. The Board could reasonably conclude it would be inappropriate to grant the request for another decision-maker, thus allowing the applicant to "shop" for an adjudicator."

The fact that I made a determination of law in an earlier decision which did not favour the Landlords does not demonstrate bias nor would a reasonable person, informed of all the circumstances and viewing the matter realistically and practically, conclude that there is a reasonable apprehension of bias against the Landlord on my part.

Landlord's request that these applications be stayed

Despite his colleague, KC's request at the November 12 hearing that these applications be adjourned, JH submitted that the applications should be stayed and no interim order made.

This submission was based on the proposition that, because the October 2 order has been stayed, that stay should extend to these applications. He was not able to produce any authority for that proposition, and there is nothing in the relevant legislation suggesting that a stay of one order acts as a stay of other, separate applications, whether by the same or different parties.

JH further submitted that, at the September 28, 2009 hearing, which resulted in the October 2 order, I had not been provided with a case which, in his view, is dispositive of the issue of whether or not the *Residential Tenancies Act, 2006* ('the Act') applies to the parties in these applications. It was his position that the case of *Gary Matthews et al v. Algoma Timberlakes Co.*, Court File No. DV-770/07 so conclusively determines that issue in favour of the Landlords in these applications, that an interim order ought not to be made because the Act clearly does not apply to the leases in these applications.

Having reviewed the *Matthews* case, I do not accept JH's submission. In that case the court agreed with the Member's determination that the Act did not apply because the camp sites in issue were used and intended for use as recreational property, not as residential property. The facts of that case are vastly different than this case. There, the camp sites constituted 1% of a 150,000 acre wilderness. The leases provided that the use of the lands was for recreational purposes only and that the mutual express intent of the parties was that Residential Tenancies legislation did not apply. None of the services and facilities referred to in S. 161 of the Act, such as garbage disposal, snow plowing, road maintenance and infrastructure maintenance were provided by the Landlord, nor could they reasonably be provided in the wilderness where the camp sites were scattered over a vast area, and access to the camp sites was only by all terrain vehicle or boat. Indeed the Tenants requested that the Landlord be exempted from the requirement to provide those services and facilities. It should also be noted that this case is under appeal to the Court of Appeal.

The facts in these applications are that the Tenant's homes are located in relatively close proximity to one another and to the main lodge/complex where many of the facilities and services forming part of the land lease community are located. The Landlord has provided, for many decades, the services and facilities required by the Act. There was neither the intention nor the practice that the homes would be used only for recreational purposes. They are used year-round and in some cases are the only homes that the Tenants have in Canada. These "snowbirds" spend the summer in Canada in their home at GEP and the winter in Florida in similar accommodations. Tenants have lived in these homes in accordance with their own circumstances and schedules, which varied from time to time. There were no restrictions on when or to what extent the homes would be occupied by the Tenants.

There is nothing in the Act that requires a tenant to live in their home 365 days a year in order for the Act to apply. Nor is there anything in the Act suggesting that the Act will apply to only one rental unit per person. If the Act were interpreted in this way, a business person with a rented 'pied a terre' in Toronto and a rental unit in Niagara-on-the-Lake would be surprised to find that the provisions of the Act may apply to only one or neither of his or her residences.

As JH pointed out in an e-mail to one of the Tenants in mid-September 2009, each case of determining whether the Act applies to land leases will turn on its own facts. The facts in these applications supports the conclusion that the Act applies.

The Facts

The evidence concerning the services and facilities at GEP both before and after October 2009 is uncontroverted. Both ET, the owner and operator of GEP from approximately 1955 until October 2009, and JST, the owner or owner's representative since October 2009 were present at the hearing of November 18, 2009 and did not dispute the evidence given by the Tenants in this regard. JH did not cross-examine the Tenants or raise any objection to the facts, other than to submit that the Tenants could be compensated in money for the services and facilities that had been removed.

Maintaining the Status Quo

JH submitted that no interim order should be issued, and that the Tenants could be compensated in money for the services and facilities removed from them, should they ultimately succeed in the appeals of the October 2 order initiated by the Landlords, and the hearing of these applications.

JH submitted that the Divisional Court case of *First Ontario Realty Corporation Ltd. V Liangrui Deng, Guizhi He, Dustin Yang, Jenny Yang and Ye Yang,* Court File No. 151/08 supports this position.

The fundamental issue in that case was whether infill lands, formerly used by Tenants for walking and sitting, but taken by the Landlord to construct infill housing, constituted a common recreational facility within the definition of services and facilities found in s. 1 of the *Tenant Protection Act, 1997.* The Court found that the infill lands were not a common recreational facility.

The services at issue in these applications go to the very ability of the Tenants to reside in their homes. Without a supply of propane, the Tenants dependant on this fuel source cannot cook, refrigerate food, heat or light their homes. Similarly those Tenants who paid the Landlord for the supply of electricity to their homes require it to live there. If the roads are not maintained and plowed as they have been for decades, accessibility to the Tenants homes is compromised. If appropriate garbage disposal is not restored there is the risk of illness or animal infestation. If access to the running water, showers and toilets in the main house is not given, the Tenants are not able to use their homes for lack of this infrastructure that has been provided to them for decades.

In short, the prejudice to the Tenants is serious, and not readily compensable in damages, as their use and enjoyment of their homes would be taken from them.

The interim order does not grant new rights to the Tenants or impose new obligations on the Landlord. The interim order preserves the status quo that has existed for many decades at GEP and that was in existence when the new owner purchased the property. The Landlord has chosen to alter the status quo by removing essential services, contrary to the requirements of the Act, and in the face of a Board order finding that the Act including the provisions of Part X of the Act apply.

The Tenants are entitled to a continuation of the use of their homes with the same facilities that have been provided for decades, pending the outcome of the appeals of the October 2 order, any appeals of this order or other resolution of the issues raised in these applications.

December 4, 2009
Date issued

Sylvia Watson
Member, Landlord and Tenant Board

Toronto North Region
7th Floor, 47 Sheppard Ave E
Toronto ON M2N 5X5