CITATION: Daley v. Linton, 2018 ONSC 5095
DIVISIONAL COURT FILE NO.: DC 194/18
LTB NO: TNL-02092-18-RV
DATE: 20180828

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: GIAN DALEY, Respondent

-and-

FERNANDO LINTON, Appellant

BEFORE: THEN, LOW, and MYERS JJ.

COUNSEL: *Ryan Hardy*, for the Appellant

Gian Daley, the Respondent, in person

HEARD at Toronto: August 28, 2018

ENDORSEMENT

MYERS J. (Orally)

Background

[1] The Appellant, Fernando Linton, brings this appeal from an eviction order granted by the Landlord and Tenant Board dated March 14, 2018 and the review order dated March 27, 2018.

[2] Gian Daley, the landlord, applied to the board for an order to terminate the tenancy and evict Mr. Linton. Mr. Linton did not attend the hearing and the order was granted by the board. Mr. Linton was ordered to vacate the unit by March 25, 2018.

The Facts

[3] Mr. Linton occupies a basement rental unit in a house in which the landlord Mr. Daley and his family reside upstairs.

[4] On February 12, 2018, Mr. Daley filed an N5 (Notice to End your Tenancy For Interfering with Others, Damage or Overcrowding) and an N7 (Notice to End your Tenancy For Causing Serious Problems in the Rental Unit or Residential Complex) with the board. He claimed that the Mr. Linton had substantially interfered with the landlord's and other tenants' reasonable enjoyment and rights and that his conduct had impaired the safety of others on the property.

[5] The notices particularized incidents in November 2017, January 2018, and February 2018 during which the Mr. Daley claimed that the Mr. Linton shouted, banged on doors, banged glass bottles, flashed lights in tenants' eyes, and video-recorded tenants with his cellphone. The notices stated that on February 1, 2018 the police were called after a heated argument. They apparently told Mr. Daley that Mr. Linton was a "danger to other people."

[6] Mr. Linton did not attend the hearing on March 9, 2018 because he says that he did not receive the notices of the hearing despite the proof of service my mail filed.

[7] The board found that the evidence presented by Mr. Daley was sufficient to prove that Mr. Linton had substantially interfered with the reasonable enjoyment of the premises by the landlord and other tenants. It therefore ordered that Mr. Linton be evicted.

[8] The board found that there was insufficient evidence to conclude that Mr. Linton's conduct seriously impaired others' safety. That ground of eviction is no longer in issue therefore.

[9] The Board's decision was upheld on a review conducted by a Vice Chair on March 27, 2018.

[10] Mr. Linton appeals on the basis that the board was not entitled to make an eviction order without making a finding under s. 64 (3) of the *Residential Tenancies Act*, SO 2006, c 17, that the tenant had failed to stop the offensive conduct within seven days after receiving the landlord's eviction notice. Mr. Linton argues that the board is not entitled to evict a tenant using an N5 process without making that mandatory finding. Therefore, he asserts that the board made an error in law that must lead to its order being set aside.

[11] Mr. Linton notes that in his review decision, the Vice Chair upheld the board's eviction without the mandatory finding under s. 64 (3) of the statute on the basis that "[t]here was uncontested oral evidence at the hearing that the tenant repeated the offending conduct within the [seven day] voiding period." There was no recording of the initial hearing and no transcript available to the Vice Chair. In the initial eviction decision, the board did not make any reference to the seven day voiding period at all or to evidence that the tenant had repeated any conduct during that time. The tenant argues that absent a transcript of the hearing and any reference to the facts or evidence in the board's decision, it was not open to the Vice Chair to make the finding that he made.

[12] Mr. Linton also argues that the failure of the board to record the hearing amounted to a denial of procedural fairness. He also argues that his right to procedural fairness was violated because he did not receive the landlord's N5 notice by mail until the day of the hearing itself. In his review of the Board's decision, the Vice Chair rejected the credibility of Mr. Linton's explanation of his late receipt of the N5 notice. Mr. Linton also appeals that credibility finding.

Jurisdiction

[13] The Court has jurisdiction to hear this appeal under s. 210(1) of the *Residential Tenancies Act*. Under that section, appeals are strictly limited to questions of law alone.

Standard of Review

[14] The standard of review in appeals under the *Residential Tenancies Act* is reasonableness and was recently described by Wilton-Siegel J. in *Agyapong v. Jevco Insurance Company et al.*, 2018 ONSC 878 (CanLII):

In determining whether a decision is reasonable, the court is concerned largely with the justification, transparency and intelligibility of the Board's reasons, as well as whether the decision falls within a range of possible, acceptable outcomes, given the facts and law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) at para. 47.

Analysis

[15] We are all of the view that the appeal must be allowed. The N5 process is one of the few incursions into the security of tenure held by residential tenants in Ontario. It is fundamental to the landlord and tenant regime in this province, that eviction is only available on a few listed grounds and then only on strict proof of the facts on which the eviction is based. It is necessary for the landlord to prove and for the Board to make a finding that the N5 eviction notice did not become void during the seven day period following its receipt. See, for example, TEL-76592-17 (Re), 2017 CanLII 48984 (ON LTB) at para. 3.

[16] It is an error of law for the Board to evict a tenant under an N5 process without considering whether there are facts that void the notice. In *Luray Investments Ltd. v. Recine-Pynn*, 1999 OJ 3643 (Div Ct), this court overruled an eviction decision on this and other grounds. In that case, Lane J. wrote:

Further, the reasons of the Tribunal do not disclose any consideration of the fact, as appears from the evidence may be the case, that the conduct complained of in the Notice of Early Termination ceased within the seven days next after the service of that Notice. If that conduct did cease the Notice itself states that it would be void.

[17] There is no evidence in the record of proceedings that the Board turned its mind to whether the notice had been voided; there is no reference to any evidence on the issue and no finding in the reasons that the notice was not voided. In the review decision, the Vice Chair stated at para. 4 that "There was uncontested oral evidence at the hearing that the Tenant repeated the offending conduct within the voiding period." As there is no recording or transcript of the proceeding and no reference to such evidence in the Board's reasons, there is no evidentiary basis for this assertion. It was not open to the Vice Chair on review to add to the evidence or findings of fact absent a transcript of the proceeding. His reasons fail to meet the transparency requirement necessary to attract deference.

[18] In light of this decision, we do not need to address the other grounds of appeal asserted.

[19] I note that we are not to be taken to be endorsing or approving of the tenant's conduct as found by the Board. If Mr. Linton continues to interfere with the rights of others at the house, the landlord has its rights.

THEN J.

[20] I have endorsed the Appeal Book and Compendium as follows: "This appeal is granted for reasons by way of endorsement read by Myers J. This is not a case for cots and none are awarded."

_____
Myers J.

I agree_____
Then J.

I agree_____
Low J.

Date of Endorsement: August 28, 2018

Date of Release: August 29, 2018