



Order under Section 21.2 of the Statutory Powers Procedure Act and the Residential Tenancies Act, 2006

Citation: MAYER INVESTMENTS LTD and GARTEN v PYRC and STENKA, 2023 ONLTB 18462

Date: 2023-03-03

File Number: LTB-L-077840-22-RV

In the matter of: 33, 2 SUPERIOR AVENUE
ETOBICOKE ON M8V2M3

Between: MAYER INVESTMENTS LTD Landlords
IRVING GARTEN

And

JOZEF PYRC Tenant

And

EDWARD STENKA Unauthorized Occupant

Review Order

MAYER INVESTMENTS LTD and IRVING GARTEN (the 'Landlords') applied for an order to terminate the tenancy of JOZEF PYRC (the 'Tenant') and evict EDWARD STENKA (the 'Unauthorized Occupant') because the Tenant transferred occupancy of the rental unit to the Unauthorized Occupant without the Landlord's consent. The Landlord also applied for compensation by the Unauthorized Occupant for the use of the rental unit.

This application was resolved by order LTB-L-077840-22, issued on March 2, 2022.

On March 31, 2022, the Landlord requested a review of the order. On April 7, 2022, the Unauthorized Occupant requested a review of the order.

The parties' review requests were heard by video conference on July 19, 2022 and November 23, 2022. The Landlord Irving Garten ('IG'), the Landlords' legal representative Richard Fink, the Unauthorized Occupant and the Unauthorized Occupant's legal representative Dan McIntyre attended the hearing on both hearing dates.

Determinations:

The Unauthorized Occupant's Request to Review the Order

1. The Unauthorized Occupant did not establish that the presiding adjudicator's finding in the March 2, 2022 order, that the Unauthorized Occupant is not a "Tenant" as defined in the *Residential Tenancies Act, 2006* (the 'Act'), represents a serious error.



2. The Unauthorized Occupant has resided at the residential complex for over 30 years. He was the spouse of the Landlords' former building superintendent. When the superintendent's employment ended in or about February 2010, the superintendent vacated the rental unit. Shortly afterward, the Unauthorized Occupant moved-in with the Tenant in the rental unit. The Unauthorized Occupant has occupied the rental unit since then.
3. I find that the Landlords were aware that the Unauthorized Occupant resided in the rental unit. Evidence introduced during the proceedings shows that the Landlords were aware of the Unauthorized Occupant's occupancy of the rental unit since at least February 2, 2016. The Unauthorized Occupant testified that he repeatedly asked the Landlords to add him as a party to the tenancy agreement. The Landlords, however, either refused or ignored the requests. The Unauthorized Occupant testified that he was unsure whether the Tenant had also asked to add the Unauthorized Occupant to the tenancy agreement.
4. Although the Unauthorized Occupant submitted several Board-approved notices from the Landlords that name the Unauthorized Occupant, including notices of rent increase, I find that this is not evidence that the Landlords expressly or impliedly added the Unauthorized Occupant to the tenancy agreement. IG testified that the Unauthorized Occupant's name was included in several, but not all, notices because it was office staff's usual practice at the time to identify all residents of a rental unit, regardless of the person's status as a tenant or as an occupant. Additionally, the Unauthorized Occupant testified that he did not at any time receive confirmation from the Landlords that he had been added to the tenancy agreement.
5. Based on the evidence and submissions introduced during the proceedings, I find that the Landlords did not expressly or impliedly add the Unauthorized Occupant to the tenancy agreement.
6. On July 1, 2020, the Tenant vacated the rental unit through an agreement with the Landlords. The Unauthorized Occupant remained in the rental unit. The Unauthorized Occupant testified that an agent of the Landlords attempted to enter the rental unit on July 2, 2020, but that the Unauthorized Occupant prevented the agent from doing so. The agent advised the Unauthorized Occupant that he was not authorized to remain in the rental unit. At the hearing, the Unauthorized Occupant submitted a July 2, 2020 letter from the Landlords advising that he is not permitted to occupy the rental unit. On or about July 7, 2020, the Landlords applied to the Board to terminate the tenancy and to evict the Unauthorized Occupant.
7. The Unauthorized Occupant gave evidence of his belief that he meets the Act's definition of "Tenant", because he paid rent to the Landlords and the Landlords were aware that he occupied the rental unit during the Tenant's tenancy. The Unauthorized Occupant testified that he believes an implied tenancy is created when a landlord accepts rent from a person. The Unauthorized Occupant continued to make payments to the Landlords after the Tenant vacated the rental unit on July 1, 2020.
8. I find that the Unauthorized Occupant's belief of his status as a "Tenant" is not correct in law. Although he made payments to the Landlords, it is apparent from the evidence that the Landlords did not accept the Unauthorized Occupant's payments as rental payments to create a tenancy agreement.



9. The Landlord IG agreed at the hearing that the Landlords accepted payments from the Unauthorized Occupant while he and the Tenant occupied the rental unit. IG explained that the Landlords accepted the payments as payments on the Tenant's behalf. The Act's definition of "Rent" includes payments "given... on behalf of a tenant to the landlord".
10. IG also agreed that the Landlords continued to receive payments from the Unauthorized Occupant after the Tenant signalled his clear intent to vacate the rental unit. IG testified that the Unauthorized Occupant had made payments equal to monthly rental payments up to the hearing date. I find, however, that accepting the Unauthorized Occupant's payments did not create a tenancy with the Landlords.
11. Subsection 103(2) of the Act states: "A landlord does not create a tenancy with an unauthorized occupant of a rental unit by accepting compensation for the use and occupation of the rental unit, *unless the landlord and unauthorized occupant agree otherwise.*" [*Emphasis added.*]
12. In this present case, I find from the evidence and submissions that the Landlords did not at any time agree to create a tenancy with the Unauthorized Occupant when the Landlords accepted payments from him. The documentary evidence and testimony demonstrate that the Landlords consistently refused to add the Unauthorized Occupant to the tenancy agreement.
13. Following subsection 103(2) of the Act, in the absence of evidence to reliably conclude that the Landlords agreed to create a tenancy with the Unauthorized Occupant, I find that the latter did not prove, on a balance of probabilities, that he is a "Tenant" as defined in the Act.
14. The Unauthorized Occupant therefore did not show that the presiding adjudicator erred by finding that the Unauthorized Occupant is not a "Tenant" as defined by the Act. The Unauthorized Occupant's request to review the order must accordingly be denied.

The Landlords' Request to Review the Order

15. The Landlords submit that the presiding adjudicator erred by failing to adequately explain and/or consider evidence of the Landlords' circumstances when the adjudicator granted the Unauthorized Occupant relief from eviction under subsection 83(1)(a) of the Act.
16. I find that, although the March 2, 2022 order does recite some of the Unauthorized Occupant's evidence of his circumstances, the order does not sufficiently demonstrate that the presiding adjudicator considered the Landlords' evidence of their circumstances. The order does not address the circumstances behind the Tenant's act of vacating the rental unit, or of the Landlords' contract to renovate the rental unit. Although a Board order is not required to identify each piece of evidence or every legal submission presented during the proceedings, an order must give enough details to show that the Board adjudicator considered both parties' circumstances when exercising discretion under section 83 of the Act.
17. Having determined that the March 2, 2022 order does not explain in sufficient detail that the presiding adjudicator considered the Landlords' evidence and submissions of their circumstances, the Landlords' request to review the order is granted.



The Landlords' A2 Application

18. The Tenant transferred occupancy of the rental unit to the Unauthorized Occupant on July 1, 2020. Documentary evidence shows that the Landlords negotiated and accepted the Tenant's notice to vacate the rental unit. It is undisputed that the Unauthorized Occupant remained in the rental unit after receiving the Landlords' notice on July 2, 2020 that he is not permitted to continue occupying the rental unit. The Landlords filed their application with the Board within the required 60-day limitation period, following the transfer of occupancy.
19. As explained above, the Landlords did not expressly or impliedly enter into a tenancy agreement with the Unauthorized Occupant. The Landlords also did not agree to create a tenancy agreement by accepting payments from the Unauthorized Occupant following the July 1, 2020 transfer of occupancy. The Unauthorized Occupant therefore did not prove, on a balance of probabilities, that he is a "Tenant", or that a tenancy agreement with the Landlords exists.
20. At the hearing, I asked the Unauthorized Occupant's legal representative to give submissions on whether a person who is not a "Tenant" may be granted relief under section 83 of the Act. The Unauthorized Occupant's legal representative did not have case law, or other legal authority, to show that a person who is not a "Tenant" may be granted relief from eviction where a tenancy agreement does not exist. The Landlords' representative submitted that a person who is not a "Tenant", as defined in the Act, is not entitled to relief from eviction.
21. Pursuant to subsection 83(2) of the Act, the Board must consider whether it is not unfair in all the circumstances to refuse to grant an application to evict or tenant, or to postpone the enforcement of the eviction order under subsection 83(1) of the Act.
22. The language in subsections 83(1)(a) and 83(1)(b) of the Act does not limit the scope of section 83-type relief to only those people whom the Act defines as "Tenants". Instead, the Board may grant relief to a resident of a rental unit under section 83 of the Act, regardless of their status as a "Tenant" or occupant, "[u]pon an application for an order evicting a tenant".
23. The Landlords filed their application with the Board pursuant to subsection 100(1) of the Act, which permits a landlord to "apply to the Board for an order terminating the tenancy and *evicting the tenant* and the person to whom the occupancy of the rental unit was transferred." [*Emphasis added.*] Since the Landlords' application is an "application for an order evicting a tenant", I find that I am required to consider whether it is not unfair in all the circumstances to deny the application or to postpone the enforcement of an eviction against the Tenant and Unauthorized Occupant. That is, I find in the circumstances that I must apply section 83 to the Landlords' application.

Section 83

24. The Unauthorized Occupant has resided at the residential complex for over 30 years, having lived the last 12 or 13 years in the rental unit as the Tenant's former



roommate/occupant. Understandably, the Unauthorized Occupant described the rental unit and residential complex as his home. The Unauthorized Occupant gave evidence of his belief that, if he is required to vacate the rental unit, he will be unable to find suitable accommodations in the same area of the city and at an affordable price. The Unauthorized Occupant testified that he is a person with a disability. The Landlords' evidence is that the Unauthorized Occupant has continued to make monthly payments equal to the monthly rent. The Unauthorized Occupant requested relief from eviction, citing the hardship he will likely experience based on age, income and medical conditions, if he is required to vacate the rental unit.

25. The Landlord IG gave evidence of some of the circumstances around the Tenant's departure from the rental unit. IG testified that the Landlords paid the Tenant \$18,000.00 in March 2020 as part of an agreement requiring the Tenant to return the vacant rental unit to the Landlords. IG explained that the Landlords had also entered contracts with third parties to renovate the vacant rental unit. The Unauthorized Occupant's occupancy of the rental unit has prevented the Landlords from beginning the work. At the hearing, the Landlords submitted that they negotiated repossessing the vacant rental unit in good faith, and have suffered financial losses because of the Unauthorized Occupant's continued use of the rental unit. IG gave evidence of other, vacant rental units available in the city at comparable monthly rents. The Landlords requested an order terminating the tenancy and evicting the Tenant and Unauthorized Occupant from the rental unit.
26. Based on the parties' evidence and submissions, I find that it would be unfair to deny the Landlords' eviction application pursuant to subsection 83(1)(a) of the Act.
27. The Unauthorized Occupant testified that he does not know whether the Tenant in fact asked the Landlords to add the Unauthorized Occupant to the tenancy agreement. There was also no evidence that the Tenant requested the Landlords' consent to assign the tenancy to the Unauthorized Occupant. Based on the evidence, the Unauthorized Occupant was his own advocate in his wish to be added to the tenancy agreement. In the circumstances, the Landlords were under no requirement to accept the Unauthorized Occupant as a "Tenant", or otherwise enter a tenancy agreement with the Unauthorized Occupant.
28. The Act requires the Board to balance the interest of residential landlords and tenants. In this case, I find that denying the Landlords' application would be unduly prejudicial, as it would effectively create a tenancy agreement between the Landlords and Unauthorized Occupant, despite the Landlords' consistent and legitimate refusal to do so. Although an implied tenancy agreement may be created upon payment of rent in exchange for the right to occupy a rental unit, the landlord must consent to the agreement, either by act or omission. Subsection 103(2) of the Act states that a tenancy is not created if a landlord accepts payment from an unauthorized occupant, unless the landlord and unauthorized occupant agree otherwise. Here, the evidence shows that the Landlords did not agree to enter a tenancy agreement with the Unauthorized Occupant.
29. It would therefore be unfair in all the circumstances to deny the application.
30. However, based on the evidence and submissions, I conclude that it is not unfair in all the circumstances to postpone the enforcement of eviction until April 30, 2023, pursuant to subsection 83(1)(b) of the Act. In arriving at this conclusion, I am mindful of the



Unauthorized Occupant's long use of the rental unit and of evidence of his personal circumstances. The Unauthorized Occupant will require time to vacate the rental unit.

31. I am also mindful that there was no evidence that postponing the eviction will cause the Landlords imminent and irreparable financial, or any other, loss or harm. The Unauthorized Occupant has a good record of making regular, monthly payments to the Landlords. Postponing the enforcement of the eviction until April 30, 2022 therefore does not result in disproportionate, or otherwise undue, loss or harm to the Landlords.
32. All the reasons for this order are contained herein.

It is ordered that:

1. The Tenant's request to review order LTB-L-077840-22, issued on March 2, 2022, is denied.
2. The Landlords' request to review order LTB-L-077840-22, issued on March 2, 2022, is granted. The March 2, 2022 order is cancelled and replaced with the following order:
3. The tenancy between the Landlords and the Tenant is terminated. The Tenant and Unauthorized Occupant shall move out of the rental unit on or before April 30, 2023.
4. If the unit is not vacated on or before April 30, 2023, then starting May 1, 2023, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
5. 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 May 1, 2023.
6. The Unauthorized Occupant shall pay to the Landlords \$40.56 per day for compensation for the use of the unit from December 1, 2022 to the date they move out of the unit.
7. The Unauthorized Occupant shall also pay the Landlords \$201.00 for the cost of filing the application.
8. If the Unauthorized Occupant does not pay the Landlords the full amount owing on or before April 30, 2023, the Unauthorized Occupant will start to owe interest. This will be simple interest calculated from May 1, 2023 at 5.00% annually on the balance outstanding.

February 6, 2023
Date Issued

Harry Cho
Member, Landlord and Tenant Board

15 Grosvenor Street, Ground Floor
Toronto ON M7A 2G6



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 November 1, 2023 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.