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

Citation: Fitzgerald v Wehbi, 2022 ONLTB 13922
Date: 2022-12-14
File Number: LTB-T-073766-22-RV

In the matter of: 1940 Norwood Avenue
Ottawa ON K1H5K6

Between: Chris Fitzgerald and Sarah Curtis — Tenants

And

George Wehbi — Landlord

Review Order

Chris Fitzgerald and Sarah Curtis (the 'Tenants') applied for an order that George Wehbi (the 'Landlord') served an N12 notice in bad faith.

The Tenants' application was resolved by an order issued on May 3, 2022 (the 'Hearing Order').

The Landlord requested a review of the Hearing Order based on the assertion that the Member made a serious error of fact that went to the heart of his decision to grant the Tenants' application.

On September 13, 2022, an interim order was issued, referring the Landlord's request to a hearing and staying the Hearing Order (the 'Interim Order').

I heard the review by videoconference on October 11, 2022. The Landlord and the Tenants attended the hearing.

The original file number for this application was EAT-95336-21. The Board assigned the current file number when this application was transferred from the CMORE case management system to the TOP case management system.

Determinations:

1. The review process is neither an appeal nor is it intended to provide parties with an opportunity to present a better or different case than they did at first instance. **[*TSL-51694-14-IN-RV (Re)*, 2015 CanLII 23959 (ON LTB)]** The review process allows the Board to direct that an application be re-heard where: (a) there was a serious error; or (b) a party was not reasonably able to participate in the proceeding.

2. The party seeking to have an order reviewed—the Landlord in this case—bears the burden of establishing that the review should be granted and the application re-heard by the

Board. In this case, the Landlord bears the burden of establishing that there was a serious error. For the reasons set forth below, I find that the Landlord has not done so and I am not, for that reason, going to direct that the Tenants' application be re-heard.

3. On January 4, 2021, the Landlord served an N12 notice with a termination date of March 31, 2021. The N12 was based on the assertion that the Landlord had signed an agreement of purchase and sale for the rental unit.

4. The Tenants vacated the rental unit on February 15, 2021. Based on the evidence filed by the Tenant, no purchaser moved into the rental unit and, in or about March of 2021, it was listed for sale by the Landlord as vacant. The Tenants filed their T5 application on March 10, 2021.

5. At the hearing on April 12, 2022, the Member found that the Landlord did not have a purchaser—that there was no signed agreement of purchase and sale for the unit—when the N12 was served. A finding that there was no purchaser on January 4, 2021 would be sufficient to justify a finding that the N12 was delivered in bad faith because subsection 49(1) of the *Residential Tenancies Act* (the 'Act') requires the Landlord to have entered into an agreement of purchase and sale for the rental unit as a pre-condition to serving an N12—a landlord who serves an N12 before having signed an agreement of purchase and sale is acting in bad faith.

6. The Landlord asserted before me that the Member 'got it wrong' because there was, in fact, an agreement of purchase and sale in place when the N12 was served. The Landlord's request to review the Hearing Order included an agreement of purchase and sale that indicates that it was accepted on January 1, 2021.

7. What I am required to consider on this review **is not** whether there was an agreement of purchase and sale in place when the N12 was served, but whether, based on the evidence before the Member, it was a serious error for him to find that there was not an agreement in place or, put another way, was the Member's finding that there was no agreement in place on January 4, 2021 reasonable based on the evidence that was before him on April 12, 2022.

8. The Board is required to make findings of fact and determine applications based on the evidence submitted by the parties at the hearing of the application.

9. A serious error can arise where there is a material error of fact in an order demonstrated by **new evidence that was not available at the original hearing**. Parties are, however, expected to make every effort to produce all relevant evidence supporting their positions at the initial hearing of an application and cannot rely on evidence that was reasonably available to them at the time the application was heard as the basis for having the application re-heard.

10. A request to review that is based on evidence that was not before the Member will be dismissed unless the Board is satisfied the evidence: (a) is 'new' in the sense that it could not have been produced at the original hearing—i.e., it could have been discovered by the exercise of reasonable diligence; (b) is material to an issue on the application; and (c) the consideration of that evidence could have changed the result. **[See *TST-88254-17-AM-RV***

***(Re)*, 2018 CanLII 48249 (ON LTB) and *TEL-80483-17-RV2 (Re)*, 2017 CanLII 60400 (ON LTB)]** In other words, I cannot consider the agreement of purchase and sale as 'new" evidence unless the Landlord satisfies me that it could not have been produced at the hearing on April 12, 2022.

11. There is, in my view, no basis for me to find that an agreement between the Landlord and a purchaser of the rental unit that the Landlord asserts existed in January of 2021 and that was produced in August of 2022 could not have been produced in April of 2022.

12. In *St. Lewis* v. *Rancourt* **[2013 ONCA 701 (CanLII)]**, the Ontario Court of Appeal found that the 'reasonable diligence' requirement can be relaxed in exceptional circumstances where doing so is necessary to avoid a miscarriage of justice. There exist no exceptional circumstances in this case. The Landlord decided not to produce the agreement of purchase and sale for the hearing before the Member on April 12, 2022[1].

13. The Landlord testified before me on October 11, 2022 that he was unclear as to whether, at the hearing on April 12, 2022, the Member had even been referred to the agreement of purchase and sale. I find that the Member was not referred to the agreement and there is no copy of the agreement in the Board file, except as part of the Landlord's request to have the Hearing Order reviewed.

14. Where a finding of fact is challenged and is the basis for a request to review an order based on the assertion that there was a 'serious error', the issue is not whether the finding by the Member was objectively correct in light of all of the information that might exist, but whether the finding was reasonably supported by **the evidence that was before the Member on April 12, 2022**. **[See, for example, *St. Lewis* v. *Rancourt*, 2013 ONCA 701 (CanLII)]**

15. As noted above, the agreement of purchase and sale was not before the Member because it was not submitted as evidence by the Landlord. That leaves me with considering the testimony the Member heard on April 12, 2022.

16. The Landlord did not provide a transcript of the hearing on April 12, 2022. However, the Interim Order includes a summary of the oral evidence that was before the Member and, in the absence of the Landlord having provided a transcript[2], I rely on that summary, which says

> *4. I listened to the hearing recording, which starts at 2:22:36. When the hearing began the Landlord was not in attendance. At approximately 2:38:00 and following, MT stated that the purchaser did not require vacant possession, the sale was not conditional on vacant possession, the Tenant could have stayed, and MT did not know why the Landlord served an N12 notice. **At 2:45:07 MT states that he does***

[1] The fact that the Landlord chose not to engage a lawyer or licensed paralegal to assist him may have resulted in the Landlord not understanding the significance of the agreement. Still, the Landlord decided not to engage a legal professional, which, in my view, does not constitute 'exceptional circumstances'.

[2] It is, in my view, it is the *de facto* obligation of a party who asks to have an application reheard on the basis that a serious error took place during the original hearing to provide a transcript of the original hearing, or at least that part of the hearing that the party asserts results in the serious error. In this case, the Landlord did not even order the recording.

not know when the Landlord entered into an agreement for the sale of the house but he thinks it was in February 2021 (which is well after the N12 notice was served). When asked by the Member if there was a purchaser as of January 2021 MT said he didn't think so.

5. *At 2:49:59 the Landlord entered the videoconference hearing. At 2:54:25 the Landlord testified that the purchaser asked for a March 2021 closing and that the purchaser did not impose a condition that the unit be vacant.* ***At 2:56:48 the Landlord testified that he served the N12 notice as a courtesy to advise the Tenant that he had sold the house and that the purchasers want to move in. The Landlord also testified that the purchasers had told him that they were willing to allow the Tenant to remain in the unit until the summer. At 3:02:43 the Landlord testified that he had sold the house conditionally, he served the N12 notice out of courtesy, and as far as he was concerned the house was sold****.* (emphasis added)

17. It was, in my view, available to the Member to find, based on the evidence that was before him, that there was no purchaser when the N12 was served on January 4, 2021—in other words, the Member's finding was reasonable based on the evidence that was before him on April 12, 2022.

18. The Landlord's evidence before me was that MT was his representative on April 12, 2022.

19. The evidence of MT was that he thought the agreement was signed in February of 2021 and when asked by the Member if there was a purchaser in January of 2021, MT answered that he didn't think so. That evidence, in my view, provides ample support for the Member's finding that there was no purchaser when the N12 was served on January 4, 2021.

20. There appears to have been some evidence from the Landlord once he arrived that **could be** interpreted as indicating there was a purchaser on January 4, 2021, but there appears to have been no statement by the Landlord to the effect that MT's evidence was not correct and there was an agreement to sell the rental unit in place at the time the N12 was served. The fact that the Landlord showed up late to the hearing and might not have heard MT's evidence or how MT answered the Member's direct question is the fault of the Landlord.

21. The Member **might** have made a different finding had he been referred to the agreement of purchase and sale[3], but it was not put to him and the responsibility for that rests squarely on the Landlord.

22. It is also possible that another Member might have made a different finding based on the evidence or engaged in efforts to elicit more information from the Landlord. It is not, however, a serious error for the Member to have made the finding that he did based on the

[3] The Member might still have found, based on the testimony of MT, that there was no agreement in place on January 4, 2022.

evidence that was before him or to have not engaged in efforts to elicit more information from the Landlord[4].

23. It was not, in my view, necessary for the Member to have indicated that he preferred the evidence of MT over that of the Landlord. The Landlord did not directly contradicted MT such that the Member needed to assess the relative credibility of the Landlord and MT, particularly given that MT was the Landlord's representative and spoke for him on April 12, 2022.

24. I make nothing of the Member's reference in the Hearing Order to the Landlord's evidence under oath being that there was no purchaser when it was actually the evidence of MT that he didn't think there was a purchaser. MT was acting as the Landlord's representative at the hearing on April 12, 2022 and this is, at best, a typographical error in the Hearing Order.

25. Based on the preceding, I am ng, not satisfied that there is a serious error in the Hearing Order.

26. While not necessary for the purposes of my decision to dismiss the Landlord's request, I wish to note that the Member might still have granted the Tenants' application even if the agreement of purchase and sale had been before him.

27. The fact that a rental unit has been sold is not sufficient to justify an order terminating a tenancy and evicting the tenant(s) based on section 49 of the Act. For a landlord who has sold a rental unit to serve an N12, the purchaser must have a genuine desire to occupy the rental unit—to have vacant possession. In this case, it seems that the purchaser did not require vacant possession of the rental unit and was going to assume the tenancy. In his request to have the Hearing Order reviewed the Landlord says:

    It clearly indicates on the purchase and sale agreement that the unit being vacant was not a condition of the sale and that the purchaser had to assume the current tenant. The vacant possession of the property was not a condition of the sale.

28. This case emphasizes the importance of landlords either themselves understanding the applicable law, or obtaining the assistance of a licensed paralegal or lawyer. All too often landlords come before the Board on L2 applications based on N12 (or N13) notices only to have their application dismissed due to a technical issue that results in the Board having no jurisdiction to make the order the landlord is requesting. In this case, the significance of there having been a purchaser in place when the N12 was served and the necessity of establishing that fact should have been apparent and it is, in my experience, 'standard practice' for licensed paralegals and lawyers to submit the relevant agreement of purchase and sale as evidence.

[4] It is common for Members to request that a landlord who has not done so produce a copy of the agreement of purchase and sale, but it is not a serious error for a Member not to do so. The onus of producing relevant evidence to support a party's case rests on the party.

It is ordered that:

1. The request to review the Hearing Order is denied. The Hearing Order is confirmed and remains unchanged.
2. The Interim Order is canceled and the stay of the Interim Order is lifted.

December 14, 2022
Date Issued

E. Patrick Shea
Vice Chair, Landlord and Tenant Board

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