

2010 ONSC 2628
Ontario Superior Court of Justice (Divisional Court)

Cowie v. Bindlish

2010 CarswellOnt 3538, 2010 ONSC 2628, 188 A.C.W.S. (3d) 1159, 262 O.A.C. 388

**STEPHEN COWIE (Tenant / Appellant) and
MEENAKSHI BINDLISH (Landlord / Respondent)**

Matlow J., McCombs J., and Tranmer J.

Heard: March 24, 2010

Judgment: May 14, 2010

Docket: Brampton DC-07-0053-00

Counsel: Jack Fleming for Tenant / Appellant
Meenakshi Bindlishin for himself

Subject: Property

Headnote

Real property --- Landlord and tenant — Residential tenancies — Leases — Interpretation

Matlow J.:

1 Judgment is to issue allowing this appeal, setting aside the orders in appeal and remitting the application of the tenant to the Landlord and Tenant Board ("the board") with the opinion of this court for a new hearing before a different member of the board pursuant to section 210 (4) (b) of the *Residential Tenancies Act, 2006*, S.O. c. 17 ("the Act"). It is our opinion that section 5 (i) of the Act does not exempt the living accommodation which is the subject of the application of the tenant from the application of the Act. The parties may make written submissions with respect to costs by exchanging copies and delivering the submissions to the office of this court at Brampton within one month.

2 The appellant appeals two orders of the board. The first is an order made on May 4, 2007 dismissing an application brought by him, as tenant, against the respondent, his landlord, for relief in consequence of various alleged violations of the Act by the respondent. The second is an order made on June 22, 2007 dismissing the appellant's application for a review of the first order.

3 The central issue in this appeal is whether the board had jurisdiction to consider the appellant's first application. The board held that it did not and its decision was subsequently confirmed by the board, composed of a different member, in dismissing the appellant's application for a review. This issue requires an interpretation of section 5 (i) of the Act which reads, in part, as follows;

5. This Act does not apply with respect to,

(i) living accommodation whose occupant or occupants are required to share a bathroom or kitchen facility with the owner, the owner's spouse, child or parent or the spouse's child or parent, and where the owner, spouse, child or parent lives in the building in which the living accommodation is located.

4 The appellant does not dispute that living accommodation which is the subject of this appeal falls within the scope of section 5 (i). However, it is his position that the respondent, his landlord, did not "live in the building in which the living accommodation is located" at the time that he and the respondent entered into their tenancy agreement and, therefore, that the Act does apply to the room which he rented.

5 The board's decision on this jurisdictional issue is set out in paragraph 2 of the first order and reads as follows;

2. From the evidence given by the Tenant and Ms Evans, it has been determined that the Tenant rented a "room" in addition to being able to use the kitchen and bathroom which formed part of a larger complex, prior to April 1, 2007. Based on the Tenant's own evidence, he did not have exclusive use or possession of the balance of the house as part of his tenancy. The Landlord and her family chose to move into the balance of the house and at that point, the Act is clear that the tenancy between the parties is not subject to the Act. Any issues that may have arisen between the parties from that point forward fall outside the jurisdiction of the Landlord and Tenant Board.

6 The board's second decision on the appellant's application for a review reads as follows;

I am not satisfied that there may be a serious error in the order or that a serious error occurred in the proceedings.

I find that the Landlord did not unilaterally change the nature of the agreement; that it was her intention from the start to live in the residential complex. She bought the house on January 2, 2007 and the tenancy of the Tenant started on January 12, 2007. The house was almost empty of furniture at that time because the Landlord left for India on January 10, 2007 and did not return until February 21, 2007. The Tenant was the sole occupant during this period of time. It would be unreasonable to expect that she fill the house with her possessions and go to India for a month and a half - leaving the house with a stranger as the sole occupant. The request to review order CET-00207 is dismissed. The order is confirmed and remains unchanged.

7 These extracts reveal that the second board member, although agreeing with the ultimate decision of the first board member, did so for quite a different reason.

8 The transcript of the second hearing before the board reveals that the board member agreed, early in the hearing, with the appellant's counsel that the respondent could not deprive the board of jurisdiction "by simply moving in and out of the premises". She then invited the parties to "argue the merits of the appellant's application which was filed in the first place, which she referred to as a "Tenant Rights Application". There then followed a series of exchanges between the board member and the parties, their representatives and others, in no apparent order, in which each gave unsworn evidence.

9 According to the respondent;

- She was not living in the house on January 11, 2007 when she rented a shared room to the appellant or on the following day when he moved in.
- She would have rented the whole place, "then I'm not moving in. I was in a moving process. My stuff was there". This referred to her dining table "and some stuff over there".
- She intended to move into the house.

10 According to the appellant;

- It was not brought to his attention at the time that he rented his room that the respondent had just bought the house and intended to move in.

11 Having heard this evidence, the board member stated that she wanted to hear evidence directly from the appellant rather than through the words of his representative. Her request was made in the following words;

I want to know from you what did you think was going to happen in this place? What exactly when you went there, what did you think you were renting?

12 The appellant then responded as follows;

Just a room in a shared accommodation with other tenants, which they actually showed on many occasions to other people from the ads that ran in the paper for a room for rent. I rented one room there, and of course I shared the kitchen, shared the common living room and bathroom; but there was nobody residing at the residence when I moved in. And this was showed on many occasions to other people, to rent out the other two rooms, and then they told me on several occasions that they had rented them out and they'd be moving in, these other people would be moving who they showed the rooms to, which they never did, other than the one in the basement. He moved in like in the 3rd week of February, and then his friend moved in like a week later. So the two of them resided in the basement, two gentlemen.

And they continued showing the rooms for rent on a weekly basis, and they weren't able to rent them out. So I offered to pay more money and take over the whole upper level; but they wanted \$1,100.00 and I could only afford \$750.00. So they said that was not enough. Well, I couldn't afford more. When it came to the 1st of April they gave me a 30-day notice.

13 Before the hearing was completed, the board member interjected with her ruling.

I think under the circumstances that there was no change, that the landlord from the start planned to live in that place; and therefore the Board has no jurisdiction over this matter.

14 There was no evidence at either hearing that the respondent told the appellant prior to renting the room to him that it was her intention to move into the house.

15 Accordingly, the record shows that;

I. The first board member accepted jurisdiction solely on the basis of the respondent having moved into part of the house more than two months after the appellant moved into his room;

II. The second board member confirmed the decision of the first board member solely on the basis of her finding that the respondent had intended to move into part of the house at the time that she rented the room to the appellant.

16 It is my respectful view that neither view was a sufficient basis on which the board was entitled to decline jurisdiction. Both board members erred in law, albeit differently, in their respective interpretation of section 5 (i) of the Act and we must now interfere. The section explicitly creates an exemption from the general application of the Act only if the person in the category of the respondent "lives in the building in which the living accommodation is located". That means that the respondent was required to live in the building at the time when she rented the room to the appellant in order for the exemption to apply. It was not sufficient that she merely intended to move in at some subsequent time. Nor was it sufficient that she actually did move in at a subsequent time.

17 Any interpretation of section 5 (i) of the Act that would permit the respondent to unilaterally cause the board to be deprived of its jurisdiction to hear the appellant's application by forming an intention in her own mind without communicating it to the appellant or by moving into the house at a later time would be contrary to the language of the section and the intention of the Legislature and would be grossly unfair. It would also effectively result in an unwarranted revision of the tenancy agreement that the parties had made.

18 Any such interpretation would also, in my view, be inconsistent with the objectives of the Act as reflected in sections 1 and 3 (1) of the Act.

Section 3 (1) of the Act sets out the application of the Act. It reads as follows;

3.(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.

Section 1 of the Act sets out the purposes of the Act. It reads as follows;

The purposes of the Act are to provide protection for residential tenants from unlawful rent increases and unlawful evictions, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes.

19 Other grounds of appeal relating to the conduct of the board hearings including the findings made and the sufficiency of the reasons given were also briefly argued by counsel for the appellant but the respondent, who was self-represented, was understandably unable to make any submissions in response. Although we recognize that there may well be merit in these grounds too, we consider that in these circumstances it is desirable that we confine our judgment to the jurisdictional issue.

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