Valdeek Ltd. v. Glisovic, [1988] O.J. No. 3135

Ontario Judgments

Ontario District Court

Toronto, Ontario

A.J. Davidson J.

Heard: November 18, 1988.

Oral judgment: November 18, 1988.

[1988] O.J. No. 3135

Between Valdeek Limited, and Cvetla Glisovic and Bob Glisovic

(26 paras.)

Counsel

D. Rubin, Esq.: for the Landlords.

Ms. S. Vella: for the Tenants.

REASONS FOR JUDGMENT:

A.J. DAVIDSON J. (orally)

1 In this matter, the landlord seeks a declaration that the tenancy agreement is terminated and asks for a writ of possession. The basis of the application is Section 113 of The Landlord and Tenant Act relative to and I quote, "caretaker's premises".

2 The landlord relies on an agreement dated the 16th day of July, 1987. Exhibit 9 is a photocopy of an agreement entered into in evidence during the examination of the tenant. It shows them living in apartment number 18 and paying $386.87 a month for rent and hydro.

3 Exhibit number 2 is a photocopy of the agreement with certain alterations entered on behalf of the landlord while its only witness was being examined.

4 In Exhibit 2, 18 being an apartment number is stroked out and 7 is substituted. There is no date indicating when this was done. The evidence show that it was June, I believe, of 1988, when the tenants moved into apartment number 7. The rent in evidence is said to be $462.60.

5 On Exhibit 2, the reference to rent remains at $386.87, but there has been an alteration showing hydro is now to be paid by the landlord. Initials appear to be C.G. which correspond at least with the initials of Cvetla Glisovic, one of the tenants, appears opposite the two alterations.

6 Mrs. Glisovic in her evidence denies that she initialled such changes and she denies that they are her initials.

7 Mr. Ingel in giving evidence for the landlord swears that she did initial the changes made by him. As I indicated, there is no date on the document as to when these were said to have been changed and initialled. Both agreements purport to employ Dana Domestic Services as superintendent. This is a name apparently registered by Mrs. Glisovic, according to the evidence.

8 The mimeographed form, indeed if that's what it is because that's a photocopy and it's hard to tell when we have never had the benefit of the original, but in mimeographed form, if I may call it that, it says 'part-time' in four places. 'Part' is changed to 'full' in two places. Part-time remains the same in two other places.

9 The landlord's agent says the employment was to be full-time. The tenant's evidence is the employment was to be part-time. Both copies of the agreement purport to impose a term that the employment terminated on two weeks notice and in such event and I quote, "she shall vacate the premises within seven days of termination".

10 The Notice of Termination is filed as Exhibit 4 and is dated August 12, 1988. The notice recites seven days notice and cancels the contract as of August 19, 1988, and requires the Glisovics vacate the premises on or before the 31st of August, 1988.

11 It appears, therefore, that the Notice of Termination is purportedly given under the Act and not under the contract or agreement.

12 There is a conflict in the evidence as to the basis upon which there were to be occupation of the premises. Mr. Glisovic says that his wife having been fired as superintendent from an adjoining apartment building and having been forced to vacate their premises by reason thereof, he told Mr. Ingel that the family wanted an apartment as tenants and not involved with any connection to being in a superintendent or caretaker arrangement.

13 Mr. Ingel was not questioned specifically on this point, but relies on the wording of the contract and the letter of July 23, 1987, which is Exhibit 6, which enclosed a copy of the contract and states in part. "occupying apartment number 18 from August 1, 1987, as part of the contract duly signed on the 16th of July, 1987, which you will be permitted to occupy with your child as long as you are superintendent of this complex".

14 Additionally, it's Mr. Ingel's evidence that had it been otherwise, that is a separate occupancy from that of a caretaker or superintendent, that he would have arranged for an application for tenancy to be filled out and would have required a security deposit of the last month's rent. The evidence is that neither of these was asked or given.

15 Mr. Ingel's evidence is that he knows Mrs. Glisovic does not read English, but he says Mr. Glisovic does and that he did read the agreement. Mr. Glisovic says he did not read the agreement. He denies having seen it.

16 It is apparent to me, during the giving of evidence that Mr. and Mrs. Glisovic have considerable difficulty speaking and understanding English, even some relatively simple questions in examination and in cross-examination were misinterpreted by them or misunderstood and the questions had to be put in different terms before they could understand and answer.

17 I think, however, they were honest and forthright in their evidence. While it would have been an easy thing for Mrs. Glisovic to echo her husband's statement in evidence as to his telling Mr. Ingel that he wanted an apartment not involved with caretaker services and thus support her case. She did not do so. I feel this was an indication of her honesty in trying to give her evidence to the best of her ability.

18 I find on the evidence that this was a condition upon which the Glisovics wore going to go into occupancy of the apartment number 18, as far as they were concerned, and that the agreement, Exhibits 2 and 9 do not accurately set out the agreement made between the parties. I say that for the above reasons and additionally, because the agreement in its terms is in conflict as to full and part-time and I find that the Glisovics were under the impression that they were dealing with a part-time situation.

19 As such, the Notice not having been given as per sections 98 and 99 of The Landlord and Tenant Act, the landlord's application cannot succeed.

20 If I am wrong in this assessment of it, I go on to consider the further aspects. The evidence is that neither apartment 18 or 7 were "caretaker's premises" before occupancy by the Glisovics and that apartment 18 is not now so occupied, although it does have an occupant and that the landlord is proposing to rent out apartment number 7 if he gets vacan possession to other than a caretaker or superintendent.

21 Then, too, a landlord is prohibited from charging rent for the one week envisaged in Section 115(3) of The Landlord and Tenant Act# and the evidence clearly shows that the Glisovics have paid rent and the landlord has accepted the rent without giving any credit for that week period from the date of notice for the months of August, September, October and November.

22 The fact that the landlord wrote without prejudice on the cheque does not in my opinion overcome the prohibition of charging or receiving rent for that one week. As such, the landlord would be in breach of Section 115(3) of The Landlord and Tenant Act and Section 121(3)(a) would apply and that would be another ground for dismissing the landlord's application.

23 In any event, Section 121(2)(a) permits a judicial discretion to refuse a writ of possession. I am of the view that this applies to the tenancy agreement even of caretaker's premises. Here the vacant possession is not sought to provide premises for a new caretaker.

24 The Glisovics I found honestly felt that they had the premises as tenants and were justified in so believing. They have always paid rent on time, even pending this proceeding.

25 The landlord is really not losing anything by them remaining as tenants and, according, even if I am in error in rejecting the landlord's application as previously set out, I would exercise my discretion and refuse the landlord's application as I do not feel, in all the circumstances, that it would be unfair to do so. Consequently, the landlord's application is dismissed.

26 In the circumstances, the dismissal will be without costs. For oral reasons given this day, the landlord's application is dismissed without costs.

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