

McBride v. Comfort Living Housing Co-operative Inc.

7 O.R. (3d) 394
[1992] O.J. No. 260
Action No. 572/91

Court of Appeal for Ontario, Blair, Finlayson and Arbour JJ.A.

February 14, 1992

Landlord and tenant — Residential tenancies — Termination — Non-profit housing co-operative — Termination of rights of occupancy — No jurisdiction to grant relief from forfeiture under Landlord and Tenant Act — Equitable jurisdiction available to grant relief from forfeiture — Housing co-operative subject to rules of procedural fairness and natural justice — Co-operative Corporations Act, R.S.O. 1980, c. 91 (now R.S.O. 1990, c. C.35) — Landlord and Tenant Act, R.S.O. 1980, c. 232 (now R.S.O. 1990, c. L.7) — R.R.O. 1980, Reg. 547.

Real property — Co-operatives — Non-profit housing co-operative — Termination of rights of occupancy — No jurisdiction to grant relief from forfeiture under Landlord and Tenant Act — Equitable jurisdiction available to grant relief from forfeiture — Co-operative subject to rules of procedural fairness and natural justice — Co-operative Corporations Act, R.S.O. 1980, c. 91 (now R.S.O. 1990, c. C.35) — Landlord and Tenant Act, R.S.O. 1980, c. 232 (now R.S.O. 1990, c. L.7) — R.R.O. 1980, Reg. 547.

M was a member of a housing co-operative incorporated without share capital under the Co-operative Corporations Act. She resided in a residential unit in the building owned by the co-operative. After notice to her and after meetings of the board of directors and of the membership of the co-operative, her occupancy rights were terminated and she was asked to vacate her unit. She applied for an order granting relief from forfeiture under s. 20 of the Landlord and Tenant Act . Her application was dismissed and she appealed.

Held, the appeal should be dismissed.

Under R.R.O. 1980, Reg. 547, M's residential unit in the co-operative is deemed not to be residential premises for the purposes of the Landlord and Tenant Act . The court below was correct in holding that there is no power under that Act to relieve against her forfeiture. Occupants like M whose occupancy rights are terminated, however, are not at the mercy of the membership of the co-operative. In a proper case, the courts will interfere with the internal proceedings of the membership and ensure that a member has been treated with procedural fairness and in accordance with the rules of natural justice. And, apart from the Landlord and Tenant Act , there remains the equitable jurisdiction of the court. In this case, M conceded that all proper steps had been taken to terminate her

right to occupancy and she did not rely on the equitable jurisdiction of the court. Accordingly, her appeal should be dismissed.

Alex Girvin Housing Co-operative Inc. v. Booth (1985), 51 O.R. (2d) 587, 40 R.P.R. 161 (Dist. Ct.); Don Area Co-operative Homes v. Lee (1979), 26 O.R. (2d) 40 (Co. Ct.),
ovrld

Other cases referred to

Liscumb v. Provenzano Estate (1985), 51 O.R. (2d) 129, 40 R.P.R. 31 (H.C.J.), affd (1986), 55 O.R. (2d) 404 (C.A.); Webb v. Box (1909), 19 O.L.R. 540 (Div. Ct.), leave to appeal refused (1909), 20 O.L.R. 220 (C.A.)

Statutes referred to

Co-operative Corporations Act, R.S.O. 1980, c. 91 (now R.S.O. 1990, c. C.35), s. 66(4)
Courts of Justice Act, 1984, S.O. 1984, c. 11 (now R.S.O. 1990, c. C.43), s. 111
Judicature Act, S.O. 1886, c. 16, s. 38(b)
Judicature Act, R.S.O. 1980, c. 223, s. 22
Landlord and Tenant Act, R.S.O. 1980, c. 232 (now R.S.O. 1990, c. L.7), Parts I to III, I, IV "Residential Tenancies", ss. 1(c) "residential premises" [am. 1987, c. 23, s. 1], 2, 18(1), 19(2), 20, 82, 110, 113(1)(a), (b), (g)
Residential Rent Regulation Act, 1986, S.O. 1986, c. 63 (now R.S.O. 1990, c. R.29), Part VI, ss. 1 [am. 1991, c. 4, s. 1], 1 "non-profit co-operative housing corporation", 4(1)(d)

Rules and regulations referred to

R.R.O. 1980, Reg. 547 (Landlord and Tenant Act), ss. 1, 2 [am. O. Reg. 593/87]
Rules of Civil Procedure, O. Reg. 560/84, rule 60.10

Authorities referred to

Williams and Rhodes' Canadian Law of Landlord and Tenant, 6th ed. by Christopher A.W. Bentley, John H. McNair and Mavis J. Butkus (Toronto: Carswell, 1990 looseleaf), p. 12-70

APPEAL from an order of the General Division dismissing an application for relief from forfeiture arising from a notice to vacate a unit in a housing co-operative.

Hugh M. Evans, for appellant.

Larry J. Levine, Q.C., for respondent.

The judgment of the court was delivered by

FINLAYSON J.A.:—This is an appeal by Karen McBride from the decision of the Honourable Mr. Justice Montgomery. In that decision, the appellant's application for relief from forfeiture of her tenancy was dismissed and the respondent's application for a writ of possession of her living unit, located in a housing co-operative, was granted.

The issue that is central to this appeal is the application of the Landlord and Tenant Act, R.S.O. 1980, c. 232 (now R.S.O. 1990, c. L.7) (LTA) to residential units in a building owned by a co-operative corporation incorporated under the Co-operative Corporations Act, R.S.O. 1980, c. 91 (now R.S.O. 1990, c. C.35) (CCA). In its narrowest form, the issue comes down to the effect of a regulation made under the LTA, R.R.O. 1980, Reg. 547. The relevant parts of Reg. 547 read as follows:

1. In this Regulation, "non-profit co-operative housing corporation" means a corporation incorporated without share capital under the Co-operative Corporations Act or any predecessor thereof or under similar legislation of Canada or any province thereof, the main purpose and activity of which is the provision of housing for its members, and the charter or by-laws of which provide that,

- (a) its activities shall be carried on without the purpose of gain for its members;
- (b) on dissolution, its property after payment of its debts and liabilities shall be distributed to non-profit or charitable organizations;
- (c) housing charges, other charges similar to rent, or any other charges payable by members shall be decided by a vote of the members or of a body duly elected or appointed by the members, or a committee thereof; and
- (d) termination of occupancy rights may be brought about only by a vote of the members or of a body duly elected or appointed by the members, or a committee thereof, and that the member whose occupancy rights are terminated has a right to appear and make representations prior to such vote.

2. The following are designated as classes of accommodation deemed not to be residential premises for the purposes of the Act:

1. Premises occupied by members of a non-profit co-operative housing corporation.

The respondent is incorporated as a co-operative without share capital under the provisions of the CCA. It owns and operates a 127-unit residential building called First Islington Place. It is undisputed that the respondent qualifies as a non-profit co-operative housing corporation within the meaning of the CCA as defined by Reg. 547.

The appellant applied for membership in the respondent housing co-operative on February 2, 1984. In March of the same year, she signed an acknowledgement that she

had read and understood its occupancy by-law. She moved into Unit 1205 and lived there until 1988. She then moved to Unit 810.

The appellant was a subsidized tenant and paid only \$325 per month for a three-bedroom apartment. She was a full-time student and a single parent, depending on Family Benefits Allowance to live. At the time, she had three children at home, three-year-old twins and a 10-year-old son. Her eldest son suffers from emotional problems, and is now in a residential treatment facility.

On November 26, 1990, the appellant received a letter from the president of the housing co-operative. This letter referred to complaints received from other members. The letter stated that her apartment, upon inspection, had frequently been found in a "state of disrepair". Further, the board of directors of the co-operative had decided to act under s. 5.04(d) of the occupancy by-law to establish an ad hoc inspection team which could enter her unit without notice. This team was intended to ensure that the appellant kept her apartment "in proper order, on a continuing basis".

Inspections had already taken place in November and December 1990. The appellant claims that the December inspection was done on one week oral notice. On January 28, 1991, a "spot" inspection was performed. The team again found various problems with the state of the appellant's unit, although it noted that she had been getting things done when she was "prodded" to do so. The team recommended the appellant be notified that termination of her membership in the co-operative was being considered (a Schedule G notice).

On February 12, 1991, the appellant received the Schedule G notice stating that she was in violation of ss. 5.02 and 5.05, the occupancy by-laws dealing with nuisance, maintenance and repair. The notice said that a meeting of the board of directors would be held on February 26, 1991 to consider a motion to terminate her occupancy rights. At the meeting, the appellant had an opportunity to respond to the allegations. She claims, however, that the details of the violations were never made known to her. The board carried a motion to terminate the appellant's occupancy rights on March 5, 1991.

On March 7, 1991, the appellant was served with a notice to vacate, stating that she was to vacate her unit by May 15, 1991. The appellant exercised her statutory right of appeal provided for by s. 66(4) of the CCA and in s. 10.03 of the occupancy by-laws by appealing to the membership of the co-operative as a whole. At the April 8, 1991 meeting, she was represented by counsel and submissions to the membership were made on her behalf. The discussion at the meeting was very frank, and possibly hostile to the appellant. The appellant's lawyer requested a secret vote, but the membership voted against this request. The membership also voted against allowing the appellant to stay in the co-operative and affirmed the decision of the board of directors terminating her occupancy rights. On April 15, 1991, the appellant received another letter asking her to vacate the apartment by May 15, 1991.

The appellant next made an application for an order granting permanent and interim relief from forfeiture pursuant to s. 20 of the LTA. The respondent countered with a cross-application for a writ of possession under rule 60.10 of the Rules of Civil Procedure, O. Reg. 560/84.

The applications came on before Montgomery J. who held that:

The premises (is) not a regular apartment unit, but is a unit that falls under a housing co-operative. In my view the Landlord and Tenant Act has no application to this fact situation by virtue of Reg. 547. That regulation specifically excludes the operation of the Landlord and Tenant Act and the court has no jurisdiction to grant relief from forfeiture.

Accordingly, he made orders that the application for relief from forfeiture be dismissed, that the respondent be granted possession of Unit 810, and that the respondent be granted a writ of possession for the unit.

On appeal, there was little discussion as to the propriety of the procedures followed by the respondent in obtaining the resolution of the board of directors and that of the membership dismissing the appellant's appeal from that resolution. Counsel for the appellant stated his complaint was that Montgomery J. had failed to consider the application for relief from forfeiture because he felt he lacked jurisdiction to do so. Accordingly, since the appeal related to the jurisdiction of the court, counsel for the appellant was prepared to concede, for the purposes of the appeal only, that all proper steps had been taken by the respondent in determining the appellant's right to occupancy. He requested that this court reverse the decision of Montgomery J. and send the application back to be determined on its merits so that he could invoke the provisions for relief against forfeiture provided by s. 20 of the LTA. Counsel conceded that without the assistance of s. 20 he had no case on the facts of this appeal.

Section 20 of the LTA reads as follows:

20.(1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture, whether for non-payment of rent or for other cause, the lessee may, in the lessor's action, if any, or if there is no such action pending, then in an action or summary application to a judge of the Supreme Court brought by himself, apply to the court for relief, and the court may grant such relief as, having regard to the proceedings and conduct of the parties under section 19 and to all the other circumstances, the court thinks fit, and on such terms as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the court considers just.

Reference should also be made to s. 19(2):

19(2) A right of re-entry or forfeiture under any proviso or stipulation in a

I think that it is apparent from a reading of the LTA as a whole that it is not intended that the statute should apply to occupancy rights of premises occupied by members of a non-profit co-operative housing corporation. This is the intent of Reg. 547 quoted above. Counsel for the appellant conceded that the regulation embraces the appellant's premises, but argued that the regulation has the sole effect of removing them from the protection of Part IV of the LTA, which deals exclusively with "Residential Tenancies". He submitted that s. 20, contained in Part I, was still available to the appellant.

This is not what the statute states. Section 1(c) [am. 1987, c. 23, s. 1] states that "In this Act . . . "residential premises" means (i) any premises used or intended for use for residential purposes . . . but does not include . . . (iv) such other class or classes of accommodation as may be designated by the regulations". I think that Reg. 547 takes the premises under appeal right out of the LTA.

My opinion is buttressed by a reading of Part IV of the LTA which provides a complete code for the regulation of residential premises, including its own provisions for the termination of tenancies (s. 110), applications for declarations of termination of tenancy (s. 113(1)(a)), orders for writs of possession (s. 113(1)(b)), and orders "granting relief against forfeiture on such terms and conditions as the judge may decide" (s. 113(1)(g)). This code was intended to be not only comprehensive, but exhaustive. This is made clear by s. 82 of Part IV which reads as follows:

82.(1) This Part applies to tenancies of residential premises and tenancy agreements notwithstanding any other Act or Parts I, II or III of this Act and notwithstanding any agreement or waiver to the contrary except as specifically provided in this Part.

Section 20, in Part I, can have reference only to tenancies that are not "Residential Tenancies" within the meaning of Part IV. To bring them within the purview of the LTA, counsel for the appellant had to argue that the occupancy rights of the appellant under the co-operative housing structure did create a tenancy. Unfortunately for this argument, the appellant's type of residential usage, to use a neutral term, is specifically excluded from the provisions of this somewhat paternalistic statute. In other words, while the appellant's occupancy rights appear to have all the indices of a residential tenancy and therefore should properly fall within the protection of Part IV, the Act and Reg. 547 specifically exclude premises occupied by a member of a non-profit co-operative housing project. It does not help the appellant to say that her premises are excluded only from Part IV, because only Part IV can help her. To underscore this point, the legislature appears to have repeated itself in s. 82 of the LTA by what it earlier stated in s. 2 where it provides:

2. The provisions of Parts I, II and III of this Act in so far as they apply to tenancies of residential premises are subject to Part IV.

I do not think it a coincidence that these occupancy rights are also excluded from provincial rent controls. Part VI of the Residential Rent Regulation Act, 1986, S.O. 1986, c. 63 (now R.S.O. 1990, c. R.29) (RRRA) establishes guidelines for controlling rent

increases in Ontario. According to s. 4(1)(d) of the RRRA, the Act does not apply to "living accommodation provided by a non-profit co-operative housing corporation to its members". Section 1 [am. 1991, c. 4, s. 1] of that Act defines a "non-profit co-operative housing corporation" in the same way as Reg. 547.

The material before us reveals in detail the concept of collective ownership which is the basis for the occupancy rights of members of this co-operative. The co-operative can be likened to a social club, where membership is by application and acceptance in accordance with criteria set out in the club's by-laws or regulations. Upon her written undertaking to comply with the rules of the co-operative, as determined from time to time by the membership, the appellant received a membership in the co-operative with the right to participate fully and equally in its operation and management. She paid an occupancy charge determined on a non-profit basis by the membership and, in return, received security of tenure comparable to private ownership. As long as she obeyed the rules particularized in the occupancy by-law, she was entitled to the exclusive occupancy of her suite and the use, along with other members, of the common facilities applicable to her unit. Upon leaving the unit, either by her own choice or pursuant to the termination provisions in the by-law, she did so without financial loss or gain.

In the context of clubs, decisions to expel members must be made according to the rules set by the membership. The courts recognize the supremacy, in this setting, of these consensual rules and will not interfere with a bona fide decision to terminate membership made in accordance with them. I think issues involving a member of a co-operative should be approached in the same manner.

Furthermore, the situation here does not involve a traditional landlord and tenant relationship. The members of the co-operative are the landlords and the tenants and they set the rules that each must follow. Termination of occupancy rights may be brought about only by the membership. This is why the LTA and Reg. 547 expressly acknowledge that the arm's-length relationship of landlord and tenant has no application. It is for this reason that the termination section of the co-operative's by-law mirrors the language of Reg. 547 in making it clear that, notwithstanding the provisions of s. 18(1) of the LTA, which provide for a landlord's right of re-entry, the co-operative shall have no right to terminate occupancy rights or to re-enter the unit unless the provisions of the by-law have been adhered to.

This appeal was argued on the narrow basis of the applicability of the LTA to premises in a non-profit co-operative housing project. I propose to confine my reasons to this narrow basis and hold that the LTA has no application to premises such as these which fall within the provisions of Reg. 547. Section 20 of the LTA is thus not available to the appellant and Montgomery J. was correct in holding that he had no power under the LTA to relieve against forfeiture. The lower court cases which purported to apply Parts I to III of the LTA to co-operative housing are in error: see *Don Area Co-operative Homes v. Lee* (1979), 26 O.R. (2d) 40 (Co. Ct.); *Alex Girvin Housing Co-operative Inc. v. Booth* (1985), 51 O.R. (2d) 587 (Dist. Ct.).

In so holding, I am not to be taken as saying that an occupant such as the appellant is at the mercy of the membership of the co-operative when her occupancy rights are terminated. The courts, in a proper case, will interfere with the internal proceedings of the membership and ensure that a member has been treated with procedural fairness and in accordance with the rules of natural justice. This remedy, however, does not lie under the LTA.

Again, I do not rule out the equitable jurisdiction of the court to grant relief against forfeiture apart from the provisions of the LTA. According to Williams and Rhodes' *Canadian Law of Landlord and Tenant*, 6th ed. (Toronto: Carswell, 1990 looseleaf), at p. 12-70, the powers of the courts to relieve against forfeiture are found in:

- (1) the equitable jurisdiction of the Court of Chancery vested in the superior courts by the Judicature Acts of the various provinces;
- (2) specific provisions in the Judicature Acts of some provinces; and
- (3) the provisions of the Landlord and Tenant Acts of some provinces.

By the Judicature Act, S.O. 1886, c. 16, s. 38(b), Ontario enacted a general provision giving the courts power to relieve against all penalties and forfeitures. That provision was re-enacted in the various Judicature Acts, until the last was repealed and replaced by the Courts of Justice Act, 1984, S.O. 1984, c. 11 (now R.S.O. 1990, c. C.43) (CJA). The provision in the last Judicature Act, R.S.O. 1980, c. 223, read:

22. The court has power to relieve against all penalties and forfeitures, and, in granting such relief, to impose such terms as to costs, expenses, damages, compensation and all other matters, as are considered just.

Section 111 (now s. 98) of the CJA now sets out the equitable power of the court in much the same fashion:

111. A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

This section apparently does not empower a court to relieve against penalties and forfeitures imposed by statute: *Webb v. Box* (1909), 19 O.L.R. 540 (Div. Ct.) (leave to appeal refused (1909), 20 O.L.R. 220 (C.A.)). The use of this general power of relief was approved by the High Court in *Liscumb v. Provenzano Estate* (1985), 51 O.R. (2d) 129, 40 R.P.R. 31 (H.C.J.), which was later affirmed in this court: (1986), 55 O.R. (2d) 404 (C.A.).

In this case, however, the appellant did not rely on the equitable jurisdiction of this court. Accordingly, on the basis that the LTA has no application to the facts of this appeal, I would dismiss the appeal with costs.

Appeal dismissed.