CITATION: Musilla v. Avcan Management Inc., 2011 ONCA 502
DATE: 20110712
DOCKET: C53166

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Cronk and Rouleau JJ.A.

BETWEEN:

Sarah Musilla

Tenant (Appellant)

and

Avcan Management Inc.

Landlord (Respondent in Appeal)

Kenneth Hale, for the tenant (appellant)

Robert G. Doumani, for the landlord (respondent)

Heard: July 4, 2011

On appeal from the order of the Divisional Court (Regional Senior Justice E. Then and Justices T. Matlow and K. Swinton) dated October 12, 2010, with reasons reported at (2010), 270 O.A.C. 156.

ENDORSEMENT

[1] The appellant submitted an application to the respondent to rent an apartment for a period of one year. She provided the respondent with a deposit equal to one month's rent. The respondent accepted the application.

[2] It is common ground that once the respondent accepted the application, the parties entered into a legally binding agreement to rent. Six weeks before the appellant was to take possession, she informed the respondent that she would not proceed with the rental and asked for the return of her deposit.

[3] Two weeks later, the respondent informed the appellant that it would not return the deposit and that it was prepared to give the appellant possession of the unit. The respondent was not able to re-rent the apartment until two months after the appellant was to take possession.

[4] The appellant applied to the Landlord and Tenant Board for a return of the deposit under s. 135(1) of the *Residential Tenancies Act, 2006*, S.O. 2006, c.17 (the "*Act*"). Her application was based on s. 107(1) of the *Act* which reads:

> 107.(1) – A landlord shall repay the amount received as a rent deposit in respect of a rental unit if vacant possession of the rental unit is *not given* to the prospective tenant. [Emphasis added.]

[5] The appellant argued that since she did not take possession of the apartment, she was not given possession within the meaning of the section. The appellant submits that the reason that a tenant does not take possession of a rental premises is immaterial to

whether possession was given. In this case, the fact that it was the appellant who breached the agreement to rent does not disentitle her to a return of the deposit.

[6] The Landlord and Tenant Board dismissed the appellant's application. The Divisional Court dismissed her appeal. The appellant appeals to this court with leave.

[7] There are two issues on this appeal:

a) the interpretation of s. 107(1) of the *Act*; and

b) the nature of the deposit in this case.

A. Section 107(1)

[8] The Board and the Divisional Court held that s. 107(1) requires a landlord to return a rent deposit only if vacant possession is refused by the landlord. Where there is an agreement for rental of a residence and a tenant does not take possession of the residence when offered, the landlord is entitled to retain a rent deposit in accordance with the provisions in a rental agreement.

[9] We agree with the reasons of the Divisional Court that s. 107(1) of the *Act* does not authorize a tenant to obtain the automatic return of a rent deposit where the landlord has done everything necessary to give the possession of the leased premises and the tenant has unilaterally repudiated the rental agreement.

[10] In particular, we agree with the following observation:

> When one looks at the words of s. 107(1), it is notable that the landlord is to return the deposit if vacant possession is 'not

> given' to the prospective tenant. The words 'not given' suggest that it is the refusal or inability of the landlord to provide the premises that triggers the obligation to return the deposit to the prospective tenant. In the present case, however, it was the tenant's action in refusing to take the unit that prevented her from taking possession, not any act of the landlord.

[11] This interpretation accords with common sense and fairness. To permit a tenant, who is legally obligated to take possession, to regain a rent deposit where the landlord has done everything it was required to do in order to give possession would render meaningless the concept of a rent deposit to secure the tenant's obligation to pay rent.

[12] However, we would add one qualification to what the Divisional Court said about a landlord's ability to retain a rent deposit.

[13] Sections 105(1) and 106(10) of the *Act* provide that a landlord may only take a deposit as security against the payment of the last month's rent. The landlord may not take a deposit to secure any other obligation. Thus, if a tenant breaches a tenancy agreement and the landlord, in accordance with its obligation to mitigate its damages, is able to re-rent the premises without suffering any loss of rent, the landlord is not entitled to retain the rent deposit. The landlord cannot realize double payment by use of a deposit, nor can it apply the funds to any other purpose.

B. The Deposit

[14] In our view, it is not clear in this case that the agreement formed by the respondent's acceptance of the appellant's rental application authorized the respondent to use the deposit as security against the payment of rent.

[15] The deposit was made pursuant to provisions of the respondent's standard form rental application. Upon acceptance, it became a legally binding agreement to rent. The rental application contemplated that the parties would enter into a Tenancy Agreement in the landlord's usual form (a "Tenancy Agreement"). Because the appellant breached the agreement to rent, the parties did not enter into a Tenancy Agreement.

[16] The rental application addressed the issue of a deposit in an unsatisfactory manner. The issue of the deposit can be looked at in two parts. One part is illegal and the other is confusing.

[17] The illegal part reads as follows:

> If the undersigned should fail to enter upon such Tenancy Agreement, then, subject to the Code of Ethics of the UDI, in addition to any other rights accruing to the landlord, the undersigned agrees that the deposit shall be forfeited.

[18] The respondent concedes that this provision is illegal. It provides that the deposit be forfeited if the tenant fails to enter into a Tenancy Agreement. Under this provision, a deposit could be used for a purpose other than the authorized purpose of securing the payment of rent.

[19] The confusing part concerns the use of the deposit as payment for the last month's rent. The clause in the rental application that specifically addresses the deposit provides that in the event the tenant enters into a Tenancy Agreement, the deposit may be applied to the last month's rent. The use of the deposit to secure the last month's rent is permitted under the *Act*. However, in this case, the appellant did not enter into a Tenancy Agreement. On a plain reading of this language, the circumstances in which the respondent could use the deposit as security against the payment of rent had not been triggered.

[20] In another part of the rental agreement, the appellant's deposit is referred to as "prepaid last month's rent". While it may be that the respondent considered that the deposit could be used as a rental deposit because of that provision, the difficulty is that the rental application does not clearly so provide. It would have been a simple matter for the respondent to draft clear language that would limit the use of a deposit to unpaid rent, whether or not the Tenancy Agreement was entered into. The respondent did not do that.

[21] Moreover, when the appellant notified the respondent that she did not wish to proceed with the rental, the respondent did not treat the deposit as a rental deposit. More than four weeks before the rental was to begin, the respondent informed the appellant that it was retaining the deposit. At that point, the respondent did not know whether it would suffer a loss of rent or not. In effect, the respondent treated the deposit as a forfeiture penalty. That use is not permitted under the *Act*.

[22] In the result, we decline to permit the respondent to retain the deposit. The appeal is allowed. The respondent shall pay the appellant's costs fixed in the amount of $5,000, inclusive of disbursements and applicable taxes. The order of the Divisional Court with respect to the costs of the appeal to that court shall be reversed. Thus, the respondent shall pay the appellant's costs in the Divisional Court fixed in the amount of $2,000.

A.C.J.O.

J.A.

J.A.