CITATION: Musilla v. Avcan Management Inc., 2010 ONSC 5425
COURT FILE NO.: 393/09
DATE: 20101012

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

THEN R.S.J., MATLOW AND SWINTON JJ.

B E T W E E N:	
SARAH MUSILLA	*Kenneth Hale*, for the Applicant (Appellant)
Applicant (Appellant)	
- and -	
AVCAN MANAGEMENT INC.	*Robert G. Doumani*, for the Respondent (Respondent on Appeal)
Respondent (Respondent on Appeal)	
	HEARD AT TORONTO: September 23, 2010

SWINTON J.:

Overview

[1] Sarah Musilla ("the Tenant") appeals the order of the Landlord and Tenant Board ("the Board") dated October 22, 2008 and the review order dated July 24, 2009 dismissing her application for the repayment of a rent deposit. At issue in this appeal is the proper interpretation of s. 107(1) of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 ("the Act"), a provision requiring a landlord to repay a rent deposit if vacant possession of a rental unit is not given to a prospective tenant.

Background

[2] On August 10, 2007, the Tenant submitted a rental application for an apartment unit to the respondent Avcan Management Inc. ("the Landlord"). With the application, she provided a

cheque for $1,145.00, which was the equivalent of one month's rent. The proposed tenancy was for a one year term to commence November 1, 2007.

[3] The rental application form contained a clause dealing with the forfeiture of the rent deposit as follows:

> The undersigned agrees that upon acceptance of this application by the Landlord, a binding Agreement shall be created between the parties hereto and the undersigned shall forthwith enter into a Tenancy Agreement prior to possession of the premises upon the above terms, upon the Landlord's usual form, in which event the deposit shall be applied towards the last month's rent. 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.

[4] On August 16, 2007, the Landlord wrote the Tenant a letter informing her that her application had been accepted. She was asked to contact the building superintendent to sign a Tenancy Agreement.

[5] On September 17, 2007, the Tenant wrote to the property manager of the Landlord, stating that she would not sign the Tenancy Agreement and requesting the return of her rent deposit. After receiving the letter, the Landlord advertised the rental unit, but was not able to rent it until January 1, 2008.

[6] The Landlord did not return the rent deposit, leading the Tenant to bring an application before the Board for the return of the deposit.

The Statutory Framework

[7] Subsection 105(1) of the Act provides that the only security deposit that a landlord can collect is a rent deposit collected in accordance with s. 106. "Security deposit" is defined in s. 105(2) to mean

> money, property or a right paid or given by, or on behalf of, a tenant of a rental unit to a landlord or to anyone on the landlord's behalf to be held by or for the account of the landlord as security for the performance of an obligation or the payment of a liability of the tenant or to be returned to the tenant upon the happening of a condition.

[8] Section 106 requires that the rent deposit be paid on or before entering a tenancy agreement and specifies that it must be applied to the last rent period before the tenancy terminates.

[9] In the present case, the Tenant relied on s. 107(1) of the Act to claim return of her rent deposit. That provision states,

> 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.

The Board's Decision

[10] The Board dismissed the Tenant's application, finding that the Landlord had not prevented the Tenant from taking possession of the unit. It held that a tenant cannot unilaterally terminate a tenancy prior to taking possession and then seek to have the rent deposit returned.

[11] A review of this order was dismissed on the basis that there was nothing unreasonable in the Board's findings of fact or interpretation of the Act.

The Appeal

[12] An appeal lies to this Court on a question of law alone, pursuant to s. 210(1) of the Act. The only issue in this appeal is the correctness of the Board's interpretation of s. 107(1).

[13] The standard of review on this issue is correctness, given the Board was required to apply general principles of statutory interpretation to a provision of the Act (*First Ontario Realty Corp. v. Deng*, [2009] O.J. No. 4539 (Div. Ct.) at paras. 13, 16).

The Parties' Positions

[14] The Tenant submits that s. 107(1) requires a landlord to return the rent deposit if the tenant does not take possession of the unit. Therefore, the Board erred in considering whether or not it was the Landlord that refused to permit the Tenant to take possession of the rental unit. In other words, the reason for the Tenant's failure to take possession is irrelevant.

[15] The Tenant relies on a brief endorsement of the Divisional Court in *Benedetto v. Dineen*, [2006] CarswellOnt 3233 for the proposition that the only question for the Board to determine is whether vacant possession occurred. In this case, as she did not obtain vacant possession, her deposit must be returned, even though the Landlord may have a remedy against her that it can pursue in Small Claims Court.

[16] The Landlord submits that the Tenant signed a Rental Application that made her a tenant on its acceptance of the application. She could not unilaterally terminate the agreement, and the rent deposit can be forfeited because she did so. Moreover, s. 107(1) does not require a landlord to return a rent deposit where the tenant breaches a tenancy agreement and chooses not to take possession of the unit. The words of s. 107(1) show that the appropriate inquiry is whether the landlord's actions prevented the tenant from taking possession. That was not the case here.

Analysis

[17] In my view, *Benedetto* is not determinative of this appeal. The brief endorsement in that appeal reads,

> This Appeal is dismissed. In our view the Tribunal correctly interpreted s. 118.1(1) of the T.P.A. [the predecessor to the current s. 107(1)]. The deposit was paid, no lease was

signed and vacant possession was not given. The section of the Act prevails over the agreement to lease.

[18] The facts of that appeal are somewhat clearer in the reasons of the Ontario Rental Housing Tribunal (File TST-08299, dated August 18, 2005). Four prospective tenants provided a rental deposit to the landlord, who told them that the deposit was not refundable. The parties never entered a lease or rental agreement. The tenants claimed that they decided not to rent because they could not find guarantors as required by the landlord, although the landlord disputed this. The Tribunal held that vacant possession had not been given to the unit, and therefore, the deposit must be returned, despite the landlord's statement that the deposit was not refundable.

[19] I note that the Divisional Court endorsement states that no lease was signed, and vacant possession was not given. I take from this that no tenancy agreement was found to exist. In contrast, in the present case, the Board found that there was a tenancy agreement entered into when the rental application was accepted by the Landlord. The essential terms of that agreement were set out in the rental application form.

[20] The present case bears a greater resemblance to the facts in a more recent decision of this Court, *Opara v. Cook*, [2008] O.J. No. 1934 (Div. Ct.). There, the Court upheld a decision of the Board dismissing a tenant's application for a refund. The Court observed that a tenancy agreement came into effect the day the parties reached an agreement on the rental of a room and upon the rent deposit being paid. While the tenant subsequently sought to resile from the agreement before moving in, the Court upheld the Board's decision that the tenant was not entitled to the return of the deposit. However, in its reasons, the Court did not address the particular wording of s. 107(1).

[21] Similarly, in *Custidio*, another brief endorsement of the Divisional Court dated November 25, 2009, the Court held that a tenant was not entitled to the return of her deposit in circumstances where she had signed a lease after providing a rent deposit and then notified the landlord that she would not be moving into the premises. The Court held that she was no longer a "prospective tenant" and, therefore, could not claim relief under s. 107(1) of the Act.

[22] Although counsel for the Tenant suggested that the *Opara* and *Custidio* cases were wrongly decided, I disagree. 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.

[23] In addition to the words of the provision, the Landlord submitted that the Court should consider the legislative debates that occurred at the time the section was enacted. It is permissible to consider legislative debates in determining the mischief addressed by the

legislation (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis 2008) at 609); *Lor Wes Contracting Ltd. v. Canada*, [1985] F.C.J. No. 178 (C.A.) at p. 6 (Quicklaw)).

[24] When the Minister moved second reading of the *Government Efficiency Act, 2001*, which contained the predecessor of the current s. 107(1) [then s. 118.1 of the *Tenant Protection Act*], he stated that improved protection was being provided to tenants by requiring landlords to return a rent deposit if they refused to rent a unit (Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, June 11, 2001, p. 2).

[25] In my view, the interpretation of s. 107(1) advanced by the Tenant would deprive the words "rent deposit" of any meaning. The purpose of a deposit is to secure the performance of an obligation. If a tenant could change his or her mind about renting a unit and demand return of the rent deposit at any time prior to the date for taking possession, the rent deposit would lose its meaning. It would provide no security to the landlord for the tenant's performance of his or her obligation to take occupancy at the date agreed upon for possession.

[26] In the present case, by the terms of the Rental Application, a binding agreement came into effect between the Landlord and the Tenant once the Landlord accepted the application. That application contained all of the essential elements of the tenancy agreement. Therefore, this is not a case like *Benedetto*, where there was never a lease or binding agreement between the parties.

[27] As in *Opara*, above, the Tenant here was bound by the agreement with the Landlord. She was not entitled to the return of the rent deposit because it was her act of repudiation of the agreement that prevented her from taking possession of the unit, not the action of the Landlord. The Board was correct in its determination that she was not legally entitled to the return of the rent deposit.

Conclusion

[28] As the Tenant has not shown any error of law on the part of the Board, the appeal is dismissed. Given the public interest nature of this case, costs are fixed at $2,000.00 payable by the Tenant within 30 days.

K. Swinton J.
Swinton J.

I agree Edward Then R.S.J.
Then R.S.J.

I agree
Mattiow J.

Released: October 12, 2010

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REASONS FOR JUDGMENT

Swinton J.

Released: October 12, 2010