

JUL - 6 2009

Order under Section 31
Residential Tenancies Act, 2006

File Number:

In the matter of:

I certify this is a true copy of the order

Between:

Tenants

and

Dated JUL 02 2009
Landlord and Tenant Board

Walmer Developments Care Of Briarlane Rental
Property Managemnt

Landlord

The Tenants applied for an order determining that Walmer Developments Care Of Briarlane Rental Property Managemnt (the 'Landlord') or the Landlord's superintendent or the Landlord's agent harassed, obstructed, coerced, threatened or interfered with them, substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household and withheld or deliberately interfered with the reasonable supply of a vital service, care service, or food that the Landlord is obligated to supply under the tenancy agreement.

This application was heard in Toronto on August 27, 2009, October 27, 2008, February 12, 2009 and April 8, 2009 in the presence of several Tenants, the Tenants' representative, law student Benjamin Ries, the Landlord's counsel, Joseph Hoffer and witnesses for the Landlord.

Stratacon Inc. is referred to in this order as the "Landlord's Third Party Service Provider".

Procedural Matters:

The hearing was originally convened before Member Ruth Carey on August 27, 2009. At the hearing on October 27, 2009, the Landlord's counsel alleged that Member Carey was biased and requested that she recuse herself. After consideration of the submissions made by both parties Member Carey did not find that there was a reasonable apprehension of bias, but out of an abundance of caution she recused herself at the October 27, 2008 hearing. The hearing was set down. The hearing on October 27, 2008 was then reconvened before me. Both parties agreed that I should preside over the hearing. The hearing was therefore recommenced with me as the presiding Member.

In the course of the hearing, both parties were given latitude in the scope of evidence introduced before the Board. However, where the evidence was not in dispute, (such as the Landlord's

File Number:

calculation of the quantum of rent reduction offered to the Tenants), or the evidence was not relevant evidence, was excluded.

The Tenants informed the Board that Tenant Donald Robert Bray died in January 2009. The Tenants requested that the application be amended to delete Mr. Bray from this application. I granted this request.

Facts and Determinations:

1. For the reasons attached, I find that by transferring the hydro (electricity) payment obligation from the Landlord to the Tenant without the consent agreement that is contemplated by section 125 of the *Residential Tenancies Act, 2006* (the "Act"), the Landlord has harassed, coerced and threatened the Tenants and substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household. I find that the Landlord has not withheld or interfered with the provision of a vital service to the Landlord.

It is ordered that:

1. The Landlord is hereby restrained from unilaterally transferring the payment obligation for electricity from the Landlord to the Tenants.
2. The Landlord shall take all reasonable steps necessary to ensure that the Landlord's Third Party Service Provider ceases to communicate directly with the Tenants.

July 2, 2009
Date Issued


Caroline King
Member, Landlord and Tenant Board

Toronto South Region
2nd Floor, 79 St. Clair Ave. E
Toronto ON M4T 1M6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

File Number:

REASONS

In the matter of:

Toronto ON M5R 2W4

Between:

Refer to attached Schedule 2

Tenants

and

Walmer Developments Care Of Briarlane Rental
Property Managemnt

Landlord

Reasons to Order TST-01693 issued on June 30, 2009 by Caroline King.

The Tenants applied for an order determining that Walmer Developments Care Of Briarlane Rental Property Managemnt (the 'Landlord') or the Landlord's superintendent or the Landlord's agent harassed, obstructed, coerced, threatened or interfered with them, substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household and withheld or deliberately interfered with the reasonable supply of a vital service, care service, or food that the Landlord is obligated to supply under the tenancy agreement.

This application was heard in Toronto on August 27, 2009, October 27, 2008, February 12, 2009 and April 8, 2009 in the presence of several Tenants, the Tenants' representative law student Benjamin Ries, the Landlord's counsel Joseph Hoffer and witnesses for the Landlord.

Stratacon Inc. is referred to in this order as the "Landlord's Third Party Service Provider".

Facts and Determinations:

Factual Basis for the Application:

1. Rent for all of the Tenants was originally inclusive of hydro. Subsequently the Landlord installed hydro "smart meters", informed the Tenants (through a stream or correspondence and an information meeting) that rent would no longer be inclusive of hydro, that the Tenants' rents would be reduced to compensate the Tenants for the change and directed the Tenants to each contract directly with The Landlord's Third Party Service Provider for the provision of hydro to their rental units. The Tenants disputed the

File Number:

Landlord's right to make this change. Even after the Tenants asserted their right to continue to receive electricity without any additional charge to the Tenants, the Landlord continued to implement the transfer of electricity payment obligations from the Landlord to the Tenants. At no time did the Tenants contract directly with Landlord's Third Party Service Provider for the provision of electricity, nor did they pay any money to Landlord's Third Party Service Provider in respect of electricity, yet the Tenants received invoices from Landlord's Third Party Service Provider for the provision of electricity services from Landlord's Third Party Service Provider to the Tenants. Among the correspondence the Landlord sent out to the Tenants regarding the transfer of electricity payment obligation was a form letter which contained the following clause:

The supply of electricity continues to be available to you through [the Landlord's Third Party Service Provider] and you should make arrangements with them for payment for electricity supplied to you. Should you not make arrangements for payment for the supply of electricity with [the Landlord's Third Party Service Provider], you risk causing a disruption in your supply of the same.

2. The Tenants continued to dispute the Landlord's right to require the Tenants to contract with a third party for the provision of hydro. In September 2008, it was not disputed that some Tenants received invoices from Landlord's Third Party Service Provider for the provision of hydro. A copy of a Landlord's Third Party Service Provider invoice provided to the Tenant in rental unit 1206 was introduced into evidence. The photocopy is faint, but legible. On the back page of the invoice is the following information:

LATE PAYMENT CHARGES:

Late payment charges will apply to amounts due after the due date.

Additional charges may be added for non payment of accounts including collections costs, disconnection and reconnection of service.

Service may be disconnected on accounts unpaid 15 days after the due date. [emphasis added]

[The Landlord's Third Party Service Provider] is not responsible for any loss, damage or inconvenience that may result.

3. The Tenants alleged that the Landlord's actions constitute 1) an interference or withdrawal of a vital service that the Landlord is obligation to supply under a tenancy agreement; 2) substantial interference with the reasonable enjoyment of the rental unit by the Tenants; and 3) that the Landlord, the Landlord's agent harassed, obstructed, coerced, threatened or interfered with the Tenants.

File Number:**Interference or Withdrawal of a Vital Service:**

4. Subsection 21(1) of the *Residential Tenancies Act, 2006* (the "Act") states: "A landlord shall not at any time during a tenant's occupancy of a rental unit and before the day on which an order evicting the tenant is executed, withhold the reasonable supply of any vital service, care service or food that it is the landlord's obligation to supply under the tenancy agreement or deliberately interfere with the reasonable supply of any vital service, care service or food." I am of the view that this provision is intended to address the situations where a landlord deliberately cuts off a vital service, or fails to pay its bills, so the tenant is left without a supply of the vital service.
5. In this case, except for a brief period when the smart meter system was installed, the provision of hydro to the Tenants was not interfered with or withdrawn. The sole change sought by the Landlord is to transfer the fiscal responsibility from the Landlord to the Tenants and to require that the Tenants contract directly with The Landlord's Third Party Service Provider for the provision of hydro in exchange for the Landlord reducing the Tenants' monthly rent payment. As a result, I find that the Landlord's actions do not constitute interference or withdrawal of a vital service.

Substantial Interference with Reasonable Enjoyment:

6. "Section 22 of the Act states: "A landlord shall not at any time during a tenant's occupancy of a rental unit and before the day on which an order evicting the tenant is executed substantially interfere with the reasonable enjoyment of the rental unit or the residential complex in which it is located for all usual purposes by a tenant or members of his or her household. "The term "reasonable enjoyment" is not defined anywhere in the Act. I am of the view that most people would think "reasonable enjoyment" would include the honouring of commitments set out in the tenancy agreement between the parties. As a result, it seems to me that where a landlord refuses to honour a lease commitment and where the refusal to honour the commitment has a negative or potentially adverse impact on the other party, that could constitute "substantial interference with reasonable enjoyment". Clearly, if the Act specifically permitted a party to renege from a commitment in their lease agreement, then that could not constitute substantial interference with reasonable enjoyment. So for example, a tenant might very well be upset and seriously negatively impacted if a landlord raised the rent by more than the published annual guideline. But if the landlord did so in accordance with the Act, then the breach of the tenant's expectations with respect to annual rent increases cannot constitute an actionable wrong under section 22.
7. The question that then arises is: does the Act specifically discuss the primary issue in this application, which is the transfer of responsibility from the Landlord to a third party supplier of electricity? It seems to me that it does.
8. Section 125 of The *Residential Tenancies Act, 2006* (the "Act") states that where a landlord and tenant agree that the landlord shall cease to provide a prescribed service to

File Number:

the tenant, the landlord shall decrease the rent by a prescribed amount. The exact wording of the provision is as follows:

A landlord shall decrease the rent charged to a tenant for a rental unit as prescribed if the landlord and the tenant agree that the landlord will cease to provide anything referred to in subsection 123(1) with respect to the tenant's occupancy of the rental unit. [Emphasis added.]

Paragraph 16(1)9 of Ontario Regulation 516/06 states that "electricity" is a service prescribed for the purposes of section 125 of the Act. As a result of this section, I am of the view that if a landlord ceases to provide a prescribed service without consent, then doing so will constitute substantial interference with reasonable enjoyment, if the tenant is negatively impacted or potentially adversely affected.

9. Given the wording of section 125, it must first be determined whether or not there is an agreement between the Landlord and the Tenants for the Landlord to cease providing hydro.
10. The provision of hydro was included in the rent for all of the Tenants' lease agreements. There are two different versions of the Landlord's standard term long form tenancy agreements. The more recent tenancy agreements specifically anticipate the transfer of responsibility for payment of electricity from the Landlord to the Tenant. At the end of section 5, the more recent standard long form tenancy agreements provide:

The Tenant also acknowledges that where electricity is currently included in the rent the landlord, in its sole discretion, may at any time choose to meter the Tenant's Rented Premises separately and transfer responsibility for payment of electricity directly to the Tenant based on the Tenant's own consumption. In such an event the Landlord shall reduce the Monthly Rental in accordance with applicable rent control legislation and the Tenant hereby consents to such transfer of responsibility for payment of electricity. [Emphasis added.]

The older standard long form tenancy agreements do not specifically contemplate the transfer of responsibility for payment of electricity from the Landlord to the Tenant. The following clause is included on the longer term Tenants' tenancy agreements:

The Tenant shall exercise reasonable care in accordance with responsible energy conservation practices in the use of any utility supplied by the Landlord. The Tenant agrees to co-operate fully with energy conservation practices in the use of any utility supplied by the Landlord. The Tenant agrees to co-operate fully with energy conservation initiatives undertaken by the Landlord. [Emphasis added.]

File Number:

11. Do the provisions in the older and new standard long form tenancy agreements constitute agreements to cease providing a service as contemplated by section 125 of the Act?
12. For the reasons set out below, I find that the Tenants with the older standard long form tenancy agreements did not agree to the Landlord's ceasing to provide a service as contemplated by section 125 of the Act. I say this for a number of reasons. First, the "energy conservation initiatives" are not defined in the older lease agreements but the plain language interpretation of the older lease agreements suggests changes such as installation of new energy efficient appliances or the installation of new better insulated windows. It no way does it directs the Tenants' minds to the transfer of an obligation of the Landlord to pay for electricity to the Tenant in accordance with section 125 of the Act. Second, the standard long form tenancy agreements have been drafted by the Landlord. In accordance with the principles of contract law, any ambiguity in interpretation of the terms of the agreement are to be interpreted against the Landlord. It seems to me that the wording of section 125 of the Act contemplates a clear and specific agreement with respect to 1) the service that will cease; 2) the date the service will cease and 3) the amount of reduction in the rent that the Tenants will receive. As those are the crucial elements of any agreement under section 125, it seems to me that the lease agreements signed by the Tenants cannot constitute such an agreement as those elements are missing.
13. The second issue is whether or not the transfer of responsibility for paying for hydro from the Landlord to the Tenant negatively impacts or potentially adversely affects the Tenants. One of the differences that will occur if the Tenants are forced to purchase hydro from the third party supplier, is that they will lose the benefit of section 21 of the Act which is quoted in part below. Section 21 is designed to stop landlords from cutting tenants off of necessary services like electricity. Subsection 21(2) makes it clear that one of the reasons vital services get cut off is because the landlord has failed to pay their bills. It is my experience that the other kind of cut off that frequently occurs that section 21 was supposed to address is whether a landlord wants to drive a tenant out of possession or wants to retaliate against a tenant for asserting his or her rights. For example, it is commonplace for parties to come before me where the tenant has fallen into arrears of rent due to a lack of income and the landlord, in an effort to force the tenant to pay, has interrupted the supply of a vital service. Because of section 21, the tenant in that scenario has a remedy against the landlord and can get the utility restored with minimal process. Where a tenant is responsible for paying a third party directly for a vital service and the tenant falls on hard economic times causing them to default on their utility bills, there is nothing to stop the utility from turning off the supply and leaving a family cold or in the dark. In addition, where utilities are included, a prospective tenant has some idea that rent control provisions will mean predictable increases in the rent which are strictly controlled. Where utilities are separate and not included in the rent, the amount charged for the utility can fluctuate wildly which can cause financial difficulties for those with limited or fixed incomes. As a result of the above, I believe that renting a unit where utilities are included is fundamentally of benefit to the vast majority of tenants. Because it is normally a benefit when utilities are included, switching from landlord-responsible to tenant-responsible utilities arrangements means that the tenant loses tangible benefits.

File Number:

14. As a result, as the lease does not constitute an agreement under section 125, and the loss of Landlord-provided hydro has a potentially adverse impact on the Tenants, I find that the Landlord's unilateral act in transferring the service and ceasing to provide it constitutes substantial interference with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household.
15. For the reasons set out in this paragraph, I also find that the Tenants with the newer long form standard tenancy agreements have not agreed to the decrease in service as contemplated by section 125 of the Act. Section 125 of the Act makes any transfer payment responsibility for electricity from the Landlord to the Tenants contingent on the Tenants' consent. The Landlord submitted that it has the Tenants consent by virtue of paragraph 5 of the newer long form standard tenancy agreement. As stated above, I believe that the wording of section 125 means that the parties must have a meeting of the minds with respect to the elements of the agreement contemplated in section 125: the service that will no longer be provided, the effective date of the change and the amount of the decrease. Clearly paragraph 5 of the newer lease form does not contain those elements. In addition, I am cognizant of section 11 of the Act which imposes an obligation on landlords to provide basic rights information to tenants at the beginning of every tenancy. Section 11 contains no remedy clause where this is not done, but it seems to me that if the Landlord created paragraph 5 in the standard long form tenancy agreement in contemplation of transferring responsibility to the Tenants in the future, then section 11 is support for the proposition that paragraph 5 should spell out in detail exactly what the Landlord has in mind. So for example, paragraph 5 is silent on what notice if any the Tenants would have should the Landlord choose to exercise its unilateral right, and it is silent on what options the Tenants would have if it should do so (for example, one could imagine such a lease term might give the Tenants the right to terminate their tenancies). More importantly, it seems to me that the wording of section 125 indicates that such agreements are intended to be negotiated at the same time as the proposed transfer is to occur when the Landlord would know key elements of the consent like date of cessation of the service and the rebate that would result.

As the Tenants have not agreed to the transfer of responsibility for payment of electricity from the Landlord to the Tenant and because of the potential adverse impacts discussed above, I find that the Landlord's unilateral action to do so constitutes substantial interference with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household.

Harassment, Coercion, or interference with the Tenants:

16. I find that the Landlord's actions constitute harassment, coercion and interference with the Tenants. Harassment may be defined as repeat communication one knows or ought to have known would not be desired. In this case, as the Landlord proceeded to implement the transfer of payment obligation from the Landlord to the Tenants after the Tenants filed this application with the Landlord and Tenant Board alleging substantial interference with reasonable enjoyment and harassment and after the hearing for this application had commenced. The Landlord's communications to the Tenants and actions constitute

File Number:

harassment. Further, the actions of the Landlord to: mislead the Tenant's regarding the Landlord's legal rights; and to attempt to force the Tenants to enter into a contract with the Landlord's Third Party Service Provider so that the Tenants could avoid threats and/or concerns that their electricity would be cut off constitute coercion and interference with the Tenants' rights under their leases.

17. As a result the Tenants' application shall be granted. The sole remedy requested by the Tenants was for an order to require the Landlord to cease its action in transferring hydro payment obligation from the Landlord to the Tenant. This remedy has been granted.

July 2, 2009
Date Issued


Caroline King
Member, Landlord and Tenant Board

Toronto South Region
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