



Order under Section 57
Residential Tenancies Act, 2006

File Number: SOT-25187-12 and SOT-25190-12

In the matter of: 201, 8223 STANLEY AVENUE
NIAGARA FALLS ON L2E6X8

Between: Connie Topolinsky Tenants
Brian Topolinsky

and

Marineland of Canada Inc Landlord

and

In the matter of: 26, 8223 STANLEY AVE
NIAGARA FALLS ON L2E6X8

Between: Bonnie Vankesteren Tenant

and

Marineland of Canada Inc Landlord

Connie Topolinsky, Brian Topolinsky and Bonnie Vankesteren (the 'Tenants') applied for an order determining that Marineland of Canada Inc (the 'Landlord'), gave notices of termination in bad faith.

This application was heard in St. Catharines on May 10, 2012. The Tenants and the Landlord's counsel, Peter Mahoney, attended the hearing.

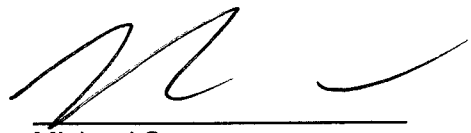
Determinations:

- 1. For reasons attached to this order, the Tenants have not proven on a balance of probabilities that the Landlord gave the Tenants notices of termination in bad faith.

It is ordered that:

- 1. The applications are dismissed.

May 16, 2012
Date issued


Michael Soo
Member, Landlord and Tenant Board

Southern-RO
119 King Street West, 6th Floor
Hamilton ON L8P4Y7

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

REASONS

Reasons to Order SOT-25187-12 and SOT-25190-12, issued on May 16, 2012 by Michael Soo.

The Applications

1. There were two applications filed by the Tenants, both of which alleged that the Landlord had served notices terminating their tenancies in bad faith. As the two applications offered identical allegations and claims, and the circumstances were also substantially identical, both applications were heard together.
2. The Tenants in the first application were Brian Topolinsky ("BT") and Connie Topolinsky ("CT"), while the Tenant in the second application was Bonnie Vankesteren ("BV"). All three Tenants attended the hearing, though BT offered most of the evidence and submissions in support of the application. The evidence for the Landlord came from Tracey Stewart ("TS"), who is employed as Director of Administration for the Landlord.

Background

3. The background history of the dispute between the parties has been fully documented in several prior orders of the Board, but I will provide a brief summary.
4. The Tenants lived in a land-lease community (the "Community") adjacent to an animal-themed amusement park operated by the Landlord in Niagara Falls. The Tenants owned the trailers in which they resided, and paid rent for the use of the land. They had lived in the Community for several years before the Landlord purchased the Community.
5. In February of 2009, the Landlord served all tenants in the Community with termination notices. The notices sought to terminate all tenancies in the Community for the purpose of conversion.
6. The Landlord claimed to require vacant possession of the Community land to accommodate expansion of its theme park. As the expansion required demolition of existing maintenance facilities, the Landlord's stated intention was to move the maintenance facilities to the Community land.
7. The Tenants in these applications, as well as other tenants in the Community, opposed termination of their tenancies. The Landlord applied for termination and eviction, and these applications were heard in a series of Board hearings in 2010 and 2011. The Landlords' applications ultimately met with success, and the tenancies at the root of these applications were terminated on March 31, 2011.
8. The Tenants now allege, based on events since March 31, 2011, that the Landlord's notices were based on bad faith. They seek monetary compensation for their alleged losses.

CONFIDENTIAL

Preliminary Issue

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The Tenants' Position

15. The Tenants' allegation of bad faith is founded on a stated belief that the Landlord served the termination notices simply to rid itself of all of the tenants occupying the Community.
16. In support of their allegation, the Tenants relied on the following circumstances:

- As shown by recent pictures submitted into evidence, the remnants of several vacant trailer homes remain undemolished;
 - the Landlord has yet to obtain building permits for the proposed maintenance buildings;
 - there are potential zoning impediments to building the proposed maintenance buildings; and
 - the slow pace of the Landlord's demolition and construction seems to contradict the urgency expressed by the Landlord in prior eviction proceedings.
17. The Tenants provided photographs of the Community as it appeared on March 31, 2012, one year after the tenancies were terminated. The pictures show that their trailers have yet to be demolished. They have been boarded up, and the Community land appears to be uninhabited.
 18. The Tenants also provided a copy of a Demolition Permit issued by the City of Niagara Falls on February 22, 2010, and amended on January 6, 2011. It allowed for demolition or removal of "**approximately 30 trailers**." It states that demolition must "commence within six months." Contrary to the Tenants' submissions, it has no expiry date.
 19. The Tenants further submitted a memo from the City of Niagara Falls, dated April 18, 2012, in response to a Freedom of Information Request, which stated that no other permits have been issued since the Demolition Permit.
 20. Also submitted was a letter from the Niagara Peninsula Conservation Authority, stating that they have not received any applications for construction on Community land, and an email from the Director of Planning and Development for the City of Niagara Falls, which addressed the requirement for Site Plan Approval before any construction occurred.
 21. The Tenants submitted that the Landlord's slow pace in demolishing the remaining trailers, obtaining building permits and bringing applications with respect to zoning issues in the past year point to a conclusion that the termination notices served in 2009, which resulted in their evictions, were essentially fraudulent.

The Landlord's Position

22. TS, the Landlord's Director of Administration, offered oral evidence for the Landlord. She testified of several factors that have slowed the pace of the conversion work.
23. TS testified that the conversion work was first delayed by the earlier Board proceedings. As the Landlord could not fully commence the work until all tenancies had been terminated, and all occupants had vacated, it was noted that the last of the Community's tenants, Beverley Morrisette, did not have her application resolved until August of 2011. A copy of the final order resolving application SOL-08774-10, dated August 18, 2011, was entered into evidence.
24. TS further testified that she arranged for the gas supply for the Community to be cut off by its supplier, Enbridge, On August 15, 2011. The gas was fully cut off on September 26,

2011. An email exchange with an Enbridge employee was entered into evidence in support of TS' testimony on this point. The Tenants disputed the authenticity of this email, an issue that I will address below.

25. TS then arranged for the Community's hydro supply to be cut off. The hydro account was closed on November 24, 2011. A final reading for the account was taken on March 16, 2012, as confirmed by a letter from Niagara Peninsula Energy, which was entered into evidence.
26. TS also testified of significant cleanup work that was required. Pictures taken by TS shortly after the tenancies ended on March 31, 2011 show that the Tenants' vacated trailers had been thoroughly damaged, with broken windows, missing exterior siding, broken doors and windows and graffiti. Significant amounts of debris had been scattered about the outside of the trailers, including broken furniture and other garbage.
27. The Tenants acknowledged that the pictures entered into evidence accurately reflected the state of their trailers at the end of their tenancies. I should note that while the pictures had inaccurate time stamps, TS testified that she had taken the pictures herself shortly after the end of the tenancies. In any event, the debris was eventually cleaned up.
28. TS testified that another factor that has delayed the conversion work was the malfunctioning of a Caterpillar excavator used by the Landlord's employees. Also submitted into evidence were pictures of the excavator, and an invoice for repairs to it.
29. Having now cut off the gas and the hydro, TS testified that workers employed by the Landlord will next tear down the remaining trailers and dig up gas and sewer pipes. TS anticipated that the work will resume during the summer months, and will take several months to complete. Once the land is entirely vacant, the Landlord will complete the detailed planning and seek building permits.
30. With respect to zoning issues, TS testified that the Landlord has special zoning status, and is aware of potential impediments to building near wetlands.

Evidentiary Issue

31. In support of TS' testimony with respect to the gas being shut off by Enbridge in August of 2011, the Landlord entered two emails into evidence. As mentioned above, the emails were exchanged between TS and an Enbridge employee. The authenticity of the emails is not particularly crucial to this application, but BT alleged, based on his proficiency with computers, that the emails were forgeries.
32. A perusal of the impugned emails shows them to be unremarkable. They appear consistent with typical emails printed from Microsoft Outlook, a common email application. BT stated that the emails did not look authentic to him, and offered a copy of an email that he had printed from Mozilla Thunderbird, another common email application. He did not seem to take issue with the authenticity of the previously-mentioned email from the Director of Planning and Development for the City of Niagara Falls, which the Tenants entered into evidence, and which also appears to have been printed in the Microsoft

Outlook format. At the time, I dismissed the allegation of forgery, as it was based on nothing more on the difference in appearance due to the differing email applications.

33. In an unsolicited post-hearing submission, BT again alleges forgery. In support of this allegation, he provides a copy of the provision of the ***Criminal Code of Canada*** with respect to perjury, printouts of emails from a newly-downloaded copy of Microsoft Outlook, and a fake email drafted by BT to show that such emails can be forged.
34. While BT stated that he is proficient with computers, an allegation of forgery should be supported by expert opinion evidence. It is not enough to point out that the email was printed in a different format, or a different font or that different print settings have been engaged. No viable evidence of forgery was offered to lead me to conclude that the documents were forged. **No Mention of Date Format Changing - Guaranteed Proof**
35. If the Tenants truly believe that documents have been forged, they may refer this matter to the Investigation and Enforcement Unit of the Ministry of Municipal Affairs and Housing.

Analysis

36. These applications are brought pursuant to s. 57(1)(c) of the **Act**. For these applications to succeed, the Tenants must prove the following:
 - **the Landlord gave a notice of termination under section 50 in bad faith;**
 - **the former Tenants vacated the rental units as a result of the notice or as a result of an application to or order made by the Board based on the notice; and**
 - **the Landlord did not demolish or convert the rental units within a reasonable time after the former Tenants vacated them.**
37. There was no dispute over the fact that the Tenants vacated the rental units as a result of Board orders founded upon termination notices served by the Landlord. What was disputed was whether the Landlord served the notices in bad faith, and whether the Landlord has demolished or converted the rental units within a reasonable time.
38. I must reiterate that the Tenants, as the applicants, bear the burden of proof on these applications. At the hearing, the Tenants submitted that the Landlord had not proven good faith. As the Landlord's counsel correctly stated in response, the Landlord is not required to prove good faith in this application. It is up to the Tenants to prove bad faith.
39. Bad faith is not defined in the Act. While there are inconsistent definitions of bad faith in the common law, it is generally accepted that bad faith refers to intent to deceive. Such an interpretation would be consistent with the theory espoused by the Tenants, as they expressly stated that they believed that the Landlord served the termination notices for the purpose of ridding itself of the occupants of the Community, rather than for any genuine intention to use the land.

40. The theory espoused by the Tenants has not changed since the earlier Board proceedings leading to their evictions on March 31, 2011. They argued at that time, ultimately without success, that the Landlord's applications for eviction should be dismissed because the initiating termination notices were not served in good faith.
41. It has been just over a year since the Tenants moved out, pursuant to eviction orders from the Board. I am unable to conclude that the evidence regarding the Landlord's action, or inaction, in this past year support a finding of bad faith.
42. The Tenants rely largely on the slow pace of the conversion work. However, TS' testimony offered a credible explanation of the slow pace of progress in the Landlord's conversion efforts. The reliability of TS' evidence was not diminished by cross-examination or contrary evidence.
43. Any suggestion that the Landlord lacked a genuine intention to demolish and convert the rental units is contradicted by the evidence. I accept that demolition work was started but delayed by the decision of these and other tenants to exercise their statutory right to challenge the evictions. The last of the challenges ended in August of 2011.
44. Gas and hydro were shut off soon thereafter, shortly before winter set in. A winter work stoppage is not unusual. I further accepted as credible TS' testimony, in which she stated that demolition of remaining trailers, and the removal of gas and sewer pipes will commence this summer, but will be complicated by the fact that they were installed at a time before the Landlord owned the Community land.
45. Based on the work already undertaken by the Landlord, I cannot find that the allegation of bad faith is proven on a balance of probabilities. On that basis, the application must be dismissed.
46. However, I would go further to find that the evidence has also failed to establish that the Landlord has not demolished or converted the rental units in a reasonable time after the Tenants vacated them. It is worth noting that a project of the sort allegedly being undertaken by the Landlord would certainly take significant time to complete. While no evidence was offered to suggest an exact timeline, the numerous steps in the process would reasonably take several years.
47. Based on the evidence, I have concluded the Landlord has undertaken the initial steps in their conversion project. A demolition permit was obtained, some demolition has been completed, and utilities have now been cut off. More intensive demolition and removal of pipes will then offer completely vacant land. I do not find it unreasonable that the land must be vacant before detailed planning for construction can be undertaken. Nor is it unreasonable that zoning issues, and building permits, will only be sought after the detailed planning is complete.

Conclusions

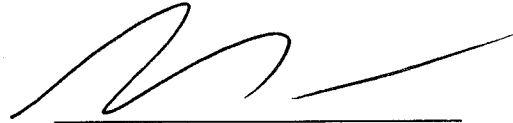
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49. Notwithstanding CT's status, I must also find that the Tenants have not met their burden of proof on these applications.
50. The applications are dismissed.

May 16, 2012

Date Issued



Michael Soo

Member, Landlord and Tenant Board

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