CITATION: Khokhlov v. Metcap Living Management Inc., 2013 ONSC 7566
DIVISIONAL COURT FILE NO.: 317/12
DATE: 20131206

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

HIMEL, SACHS AND HENNESSY JJ.

BETWEEN:	
ANDRIY KHOKHLOV Tenant (Respondent)	*Vadim Kats* and *Anna Wong*, for the Tenant (Respondent)
– and –	
METCAP LIVING MANAGEMENT INC. Landlord (Appellant)	*Rob Winterstein*, for the Landlord (Appellant)
	HEARD at Toronto: December 6, 2013

HIMEL J. (ORALLY)

[1] Metcap Living Management Inc. ("the Landlord") appeals from an order of Member Carey of the Landlord and Tenant Board, dated May 31, 2010, requiring the Landlord to compensate its former tenant under the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17.

[2] Metcap asked that the part of the order concerning the rent differential experienced by the tenant after he moved out due to the bedbug infestation should be set aside or alternatively, the matter remitted to the Board for a new hearing.

Factual Background

[3] Andriy Khokhlov ("the Tenant") moved into unit 204 at 87 Jameson Avenue, Toronto, Ontario on January 1, 2009. Various rental units and common areas within the building became infested with bedbugs and the tenant alerted the landlord about this on December 2, 2009. He claimed the landlord was slow in responding. The landlord hired a pest control company on January 8, 2010. The tenant refused to have his own rental unit treated as it was not infested at the time. However, the infestation worsened between January and April 7, 2010.

[4] The tenant sent a letter saying he wished to move out due to the infestation. The tenant discovered bedbugs in his own unit on April 9, 2010. He consented to spraying, which was done on April 12 and 30, 2010. The treatment was successful. However, the tenant found that there were bedbugs in the common hallway and he reported this until he moved out on June 17, 2010.

[5] The tenant moved to another apartment where the rent paid under that lease was $1,200 per month. The tenant applied to the Board for various remedies which included the rent differential.

[6] The hearing took place over four days, following which Member Carey issued an order with reasons finding that the landlord did not interfere with the tenant's reasonable enjoyment of the unit for the period up to December 2, 2009, that the tenant was entitled to an abatement of rent of $35.97 plus $100 for breaches by the landlord for the period December 2, 2009 to April 9, 2010. She also found the tenant was entitled to an abatement of $46.30 for the period April 9, 2010 to June 30, 2010 as a result of breaches and the tenant was entitled to be paid the difference

in rent payable between what he was paying for the rental unit and the new unit he had moved into for one year, in the amount of $4,096.20. The issue before us is with respect to the compensation ordered for the rent differential.

Jurisdiction and Standard of Review

[7] A statutory right of appeal lies from a decision of the Landlord and Tenant Board on questions of law only under s. 210(1) of the *Act*. There is agreement and our Court has held that the standard of review for questions of law relating to the Board's interpretations of its home statute is reasonableness: (See *First Ontario Realty Corporation Ltd. v. Deng*, 2011 ONCA 54).

Analysis

[8] The appellant submits that the Tribunal erred in making a rent differential order under s. 30(1)(9). The appellant agrees that such an order can be made under s. 31. Under s. 31, if there is a finding that the landlord breached s. 22 of the *Act*, i.e. substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the tenant, and if there is a finding that this conduct induced the tenant to vacate the rental unit, the Board may make a rent differential order (see s. 31(2)(a)).

[9] In this case, the Tribunal did make a finding that the landlord breached s. 22 of the *Act* when the landlord did not take any steps to respond to the tenant's complaints concerning bedbugs in the common area on his floor: (See para. 25 of the Board's reasons).

[10] The Board also made a finding that this conduct induced the tenant to leave the premises (see para. 37 of the Board's reasons). Given these findings, the Tribunal did not have to resort to the residual discretion provided for in s. 30(1)(9) of the *Act*, but could make the order under s.

31. There is no suggestion that making such an order under s. 31 would constitute an error in law.

[11] The appellant suggests the word "induced" in s. 31(2) requires a positive act. We agree with the respondent that this position is inconsistent with one of the objectives of the *Act* which is "the protection of residential tenants": (See *York (Regional Municipality) v. Thornhill Green Co-operatives Home Inc.*, [2009] O.J. No. 3036 at para. 35).

[12] To give effect to this purpose, the words "induced by the conduct of the landlord" in s. 31(2), should be interpreted liberally. A liberal interpretation calls for including any act or failure to act on the part of the landlord that persuaded the tenant to vacate the rental unit. On this issue, the Board made a finding of fact which is not subject to appeal, that the landlord`s conduct in failing to address the bedbug infestation in the common hallway induced the tenant to move out. Having found inducement as a fact, it was wholly within her discretion to order rent differential treatment under s. 31(2.)

[13] Turning to the issue regarding betterment. We are satisfied that Member Carey was alive to the principle of betterment. She accepted the tenant`s evidence in finding that his new rental unit was "equivalent and perhaps even a little smaller than the unit leased from the landlord." She did so after reviewing the tenancy agreement, which described the amenities for the new unit, and after hearing submissions from both sides on this issue. In the end, she made a factual finding that was not in the appellant's favour on this issue. Our jurisdiction is limited to errors of law.

[14] For these reasons, the appeal is dismissed.

COSTS

[15] I have endorsed the Appeal Book, "For oral reasons given, the appeal of the order of the Board is dismissed. In view of the Bill of Costs submitted, the factors which include the result achieved but also the principle of proportionality, we exercise our discretion and order costs of $5,000 payable by the appellant to the respondent."

HIMEL J.

SACHS J.

HENNESSY

Date of Reasons for Judgment: December 6, 2013

Date of Release: December 20, 2013

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BETWEEN:

ANDRIY KHOKHLOV

Tenant
(Respondent)

– and –

METCAP LIVING MANAGEMENT INC.

Landlord
(Appellant)

ORAL REASONS FOR JUDGMENT

HIMEL J.

Date of Reasons for Judgment: December 6, 2013

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