Court File No.: CV-18-00604410-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N

CLEMENT CHU, NAHOM ABADI and IDA FABRIGA-CHU

Plaintiffs

and

PARWELL INVESTMENTS INC., BLEEMAN HOLDINGS LIMITED,
650 PARLIAMENT RESIDENCES LIMITED, 650 PARLIAMENT (LHB) INVESTMENTS LIMITED, ELECTRICAL SAFETY AUTHORITY,
GREATWISE DEVELOPMENTS CORPORATION and
77 HOWARD (LHB) INVESTMENTS LIMITED

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM
(MOTION FOR REMOVAL OF CONTENTS)

June 12, 2019

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PART I – OVERVIEW & FACTS

1. On June 11, 2019, plaintiffs' counsel conducted a cross-examination of Mr. Nathan Normoyle, the Vice President of Access Restoration Services ("Access"), which is the company responsible for the remediation and repair of the buildings at 650 Parliament Street ("650 Parliament"), following which a town hall meeting with a question-and-answer session was conducted that evening for about 200 tenants and residents.

2. A number of objections and concerns have been expressed by tenants and residents, at the town hall meeting and by email. This factum is being provided to the Court and posted online so the tenants and residents of 650 Parliament can understand that class counsel is giving voice to their concerns.

3. By far the most significant and repeatedly expressed concern is the packing process already undergone, whereby Access, at the direction of the 650 Parliament landlord and owners, entered all of the units and proceeded to pack and box/wrap up the entire contents of the apartments, without notice or consent. Essentially, the packing process took place in secret during the months of February and March 2019. The boxes and wrapped contents continue to be located in the units. Mr. Normoyle advised during his cross-examination that some of the units currently contain up to 200-300 boxes.

4. As will be discussed below, the current motion to move unit contents to a temporary storage facility in the 650 Parliament parking garage is complicated by the distrust created by, *inter alia*, the lack of consent and notice regarding the packing process. In many cases, the tenants and residents only learned that their unit had been entered and all of their possessions packed upon receipt of the motion record, one or two weeks ago.

5. During the cross-examination of Mr. Normoyle, he advised that:

a. Access was directed by the 650 Parliament owners and landlord to proceed with the packing;

b. Access did not notify the tenants that they would be entering their units or seek their consent to do so;

c. Access staff packers emptied all drawers, cabinets, closets and other storage areas, and packed up all the contents they could find within the units;

d. Mr. Normoyle's affidavit sworn and served February 4, 2019, in support of the motion for contents removal (as it was then constituted) did not disclose the packing, which was already ongoing at that time;

e. the tenants and residents were not present to observe the process so as to be assured that everything was packed and packed correctly, and they had no opportunity to retrieve their possessions before or during the packing process; and

f. Access' staff packers did not inventory any of the contents.

6. During his cross-examination, Mr. Normoyle explained how Access had initially budgeted for the costs of inventorying the contents as they were packed, but the landlord and owners declined this budget item. Therefore, the inventories that should have been generated during the packing of the units, to assure tenants that everything was packed, do not exist. The tenants and residents do not have inventory lists to satisfy themselves as to whether all of their contents are in the boxes. For insurance claims and any damages assessment later on in the class action, contents inventories would have been key. As an example, a contents list generated by one tenant's insurer is attached as Schedule "A" to this factum. Had plaintiffs' counsel received notice of the plan to pack up all the contents, steps would have been taken to ensure that inventories were generated.

7. The tenants view the packing process as a serious affront to their privacy because strangers rummaged through their most sensitive possessions and emptied their homes without their knowledge or consent. In addition, the motion record delivered by the moving defendants included a hyperlink to a publicly accessible online archive of photos and videos of units taken prior to the packing process – meaning that anyone and everyone could see into their homes – further contributing to tenant and resident concerns about their privacy.

8. To further complicate matters, the motion record as delivered to the tenants and residents included requests for relief (either directly through the Notice of Motion or indirectly through the materials) that the moving defendants are no longer seeking – including seeking an order that tenants would be required to sort through their hundreds of boxes of contents within seven days and then to negotiate a payment for their contents and sign releases of all claims. There is also a legal opinion in the materials about the landlord's purported right to terminate the leases, which, in the context of seeking a settlement and signing a comprehensive release, is disturbing.

9. With respect to the adequacy of the parking garage to serve as a storage facility, plaintiffs' counsel obtained a substantial amount of information through the cross-examination of Mr. Normoyle (the transcript of which has been posted online for the review of tenants and residents), which was discussed at length during the town hall meeting. While there remain concerns, the requested conditions described below should go a long way toward addressing them.

Current status

10. The landlord has notified plaintiffs' counsel, and the tenants and residents, that its motion is now restricted to an order to move the contents to the underground garage for storage purposes. Having cross-examined Mr. Normoyle, plaintiffs' counsel do not oppose the motion

per se, subject to a number of conditions which were expressed in the tenant and resident written objections and at the town hall meeting.

11. First, Access is in the process of changing the use of the two-story underground parking garage at 650 Parliament into a makeshift storage facility. Hundreds of thousands of boxes will be stored in approximately 600 private lockers spread out across approximately 100,000 square feet over the two garage levels. If anything should happen to the garage, such as a fire, a flood, or a contaminant, the tenants and residents could lose all of their personal possessions. In this context, neither the landlord nor Access have sought or obtained a building permit or a zoning variance. The permitted use of the garage is for parking. As discussed in the law section of the factum below, a building permit is usually required for a change of use. The permit application means consultants will inspect the proposed storage facility and impose conditions, if necessary, for safety. Therefore there must be a building permit issued or confirmation provided by the City of Toronto Building department that no permit is required.

12. Second, Access has liability insurance but has refused to produce the policy. Mr. Normoyle gave evidence that Access' work contract requires the 650 Parliament landlord and owners to indemnify Access so that its insurance will not respond. It is far from clear whether the landlord and owners have insurance that would respond to a claim arising from a converted underground parking garage storage facility. If the landlord and owners do have insurance, it is also unclear whether it would be swallowed up in the policy limits problem that it is currently facing. There must be separate standalone insurance for the storage facility, with sufficient policy limits to cover a major peril such as the destruction of all of the contents.

13. Third, the vast majority of the tenants and residents at the town hall indicated their support for an order providing them with an opportunity to inspect their units and to review their

boxes of contents before they are removed from the units. Understandably, having not been able to participate in the packing, they are concerned about the packing process. At the same time, tenants and residents may wish to collect some of their contents.

14. Fourth, some tenants would prefer to store their belongings elsewhere. They seek an order permitting them to collect the boxes and move their own contents from their units.

15. Fifth, some tenants would like the opportunity to re-inspect their units after the contents are relocated, to satisfy themselves that none of their possessions were forgotten or overlooked.

16. Finally, some tenants would like an order directing Access to consult with a security company retained by the plaintiffs, which company will advise counsel whether the security measures taken are appropriate and, if necessary, make recommendations on additional measures to be taken. If the parties cannot agree on recommendations, then the Court may decide on a motion in writing.

PART II – LAW

Landlord cannot enter the apartment units and pack up the contents without notice, a court order or consent

17. The *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 ("*RTA*") establishes a system to regulate residential rental housing and to balance the rights and responsibilities of residential landlords and tenants.

18. For the protection of tenants' privacy, ss. 26 and 27 of the *RTA* prescribe the circumstances in which a landlord may enter a rental unit. In particular, s. 26 addresses the occasions on which a landlord may enter a rental unit without written notice as follows:

> (1) A landlord may enter a rental unit at any time without written notice,
> (a) in cases of emergency; or
> (b) if the tenant consents to the entry at the time of entry.
> (2) A landlord may enter a rental unit without written notice to clean it if the tenancy agreement requires the landlord to clean the rental unit at regular intervals and,
> (a) the landlord enters the unit at the times specified in the tenancy agreement; or

(b) if no times are specified, the landlord enters the unit between the hours of 8 a.m. and 8 p.m.

(3) A landlord may enter the rental unit without written notice to show the unit to prospective tenants if,

(a) the landlord and tenant have agreed that the tenancy will be terminated or one of them has given notice of termination to the other;

(b) the landlord enters the unit between the hours of 8 a.m. and 8 p.m.; and

(c) before entering, the landlord informs or makes a reasonable effort to inform the tenant of the intention to do so.

19. The landlord violated the *RTA* by entering tenants' units without written notice – or any notice at all for that matter – outside of the circumstances permitted by the *RTA*.

20. Further, to the extent that a landlord may enter a rental unit to carry out a repair or replacement or to do work in the rental unit, s. 27 of the *RTA* provides that such entry by a landlord is only permissible upon written notice to the tenant at least 24 hours before the time of entry. Section 27 of the *RTA* states in part:

(1) A landlord may enter a rental unit in accordance with written notice given to the tenant at least 24 hours before the time of entry under the following circumstances:

1. To carry out a repair or replacement or do work in the rental unit.

[...]

21. No such notice was given in this case.

22. The landlord further violated the provisions of the *RTA* by packing the tenants' belongings without their knowledge or consent.

23. The *RTA* permits a landlord to sell, retain for its own use or otherwise dispose of property in a rental unit in a limited number of circumstances, namely where:

a. the rental unit has been vacated in accordance with a notice of termination of the landlord and tenant, an agreement between the landlord and tenant to terminate the tenancy, s. 93(2) dealing with a superintendent's premises, or an order of the Landlord and Tenant Board terminating the tenancy or evicting the tenant;

b. the tenant has abandoned the rental unit and the landlord either obtains an order terminating the tenancy or provides notice to the tenant and to the Landlord and Tenant Board of its intention to dispose of the property; or

c. the tenant has died.

24. None of these provisions apply to the circumstances of this case.

25. There does not appear to be any provision in the *RTA* which would permit the landlord to enter tenants' units without, at the very least, 24 hours of written notice, or to pack tenants' contents without their knowledge or consent. As s. 25 of the *RTA* provides: "A landlord may enter a rental unit only in accordance with section 26 or 27." [emphasis added]

26. Plaintiffs' counsel have also consulted with Brendan Jowett, housing lawyer at Neighbourhood Legal Services, to discuss the landlord's conduct in this regard. Mr. Jowett confirmed that, in his view and experience, the landlord failed to comply with the *RTA* when it entered the tenants' units without any advance notice and particularly when the landlord packed the tenants' contents without their knowledge or consent.

27. Mr. Jowett further stated that, in his view, the landlord committed a violation of privacy, noting that a landlord is required to provide notice to even *enter* a unit, never mind to touch and pack tenants' belongings without their knowledge or authorization.

Permit required for change of use of building

28. Plaintiffs' counsel has good reason to believe that the 650 Parliament landlord is required to obtain a permit from the City of Toronto to convert the underground garage into a makeshift 100,000 square foot self-storage facility to store hundreds of thousands of boxes/contents of the units at 650 Parliament.

29. First, the City of Toronto website provides a non-exhaustive list of the circumstances in which a building permit is required. The list, which can be found at the link in the footnote below, provides that a permit is required, amongst other things, in order to:

> Change a building's use (i.e. from residential office or single dwelling unit house to multi-dwelling unit house). Even if no construction is proposed, if a change of use is proposed a building permit is required.[1]

30. Second, class counsel consulted with Tim Ashton, Building Consultant with Infrastructure and Development Services at the City of Toronto, to determine whether a permit would be required to convert the basement parking garage at 650 Parliament to a makeshift self-storage facility. Mr. Ashton advised that, in fact, very few changes of use of a space within a multi-storey residential building such as the one at 650 Parliament would be exempt from the requirement for a permit and confirmed that a permit would likely be required, even if the change of use was temporary.

31. Mr. Ashton advised that he could not definitively advise whether the change of use contemplated for the garage at 650 Parliament would require a permit or, if a permit could be obtained, what conditions would be imposed to ensure compliance with the Building Code, because such an analysis would form the subject matter of a zoning review or an application to the Building Code Commission for a permit.

32. Third, the information provided by Mr. Ashton is consistent with the analysis in Ruling No. 05-13-1027 of the Building Code Commission in respect of application number 2005-05.[2]

33. In that case, the applicant had applied for a permit under the *Building Code Act, 1992*, S.O. 1992, c. 23, for the conversion of the basement level of an existing mixed-use building to a self-storage facility. The building was a two-storey building containing both residential[3] and

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[1] https://www.toronto.ca/services-payments/building-construction/apply-for-a-building-permit/when-do-i-need-a-building-permit/.
[2] http://www.mah.gov.on.ca/Asset7614.aspx?method=1.
[3] Group C, residential occupancy.

mercantile[4] occupancies. The proposed use of the basement would result in a medium hazard industrial occupancy[5] being added to the building.

34. The Commission ruled that the proposed public-self storage facility provided sufficiency of compliance with the Building Code provided that a number of conditions be met to ensure the safety and security of the self-storage facility.[6]

35. Lastly, plaintiffs' counsel are in the process of obtaining a report from Vincent R. Rochon, CEO and Consulting Engineer with Roar Engineering regarding the requirement for a permit to convert a parking garage into a self-storage facility. Plaintiffs' understands that Mr. Rochon is experienced in Building Code compliance and that his opinion will be that the Toronto Building Department would likely require a change of occupancy permit for this purpose.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 12, 2019

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[4] Group E, mercantile occupancy.
[5] Group F, Division 2, medium hazard industrial occupancy.
[6] For example that: (i) the floor assembly between the proposed Group F and Group E occupancies be upgraded to provide a fire resistance rating of not less than 2 hours; (ii) all stairwell enclosures provide a fire resistance rating of not less than 2 hours; (iii) a single stage fire alarm system be installed throughout the building; and (iv) smoke detecting devices connected to the fire alarm system be installed in each suite or portion of the proposed Group F such that all areas are covered.

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