Landlord and Tenant Board
Ontario

Order under Section 9(2)
Residential Tenancies Act, 2006

File Number: SWT-68358-14

In the matter of: 227, 580 BEAVER CREEK ROAD
WATERLOO ON N2J 3Z4

Between: Luis Dos Santos — Applicant

and

Green Acre Park RV Park — Respondent

Luis Dos Santos (the 'Applicant') applied for an order to determine whether the *Residential Tenancies Act, 2006* (the 'Act') applies.

This application was heard in Waterloo on January 20, 2015. The Applicant, the Applicant's Legal Representative, Shaun Harvey, the Owner and Agent for the corporate Respondent, Bruce Martin ('B.M') and the Respondent's Legal Counsel, Leigh G. Fishleigh attended the hearing.

For the Reasons attached to this order:

Determinations:

1. The Act does not apply.

It is ordered that:

1. The Application is dismissed.

January 26, 2015
Date Issued

Kevin Lundy
Member, Landlord and Tenant Board

South West-RO
150 Dufferin Avenue, Suite 400, 4th Floor
London ON N6A5N6

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

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REASONS

In the matter of: 227, 580 BEAVER CREEK ROAD
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Between: Luis Dos Santos — Applicant

and

Green Acre Park RV Park — Respondent

Reasons to Order SWT-68358-14 issued on January 26, 2015 by Kevin Lundy.

Preliminary Issues:

1. The Applicant's application was initially to be dismissed for lack of grounds as the Applicant's Legal Representative had failed to file any materials other than a copy of the Ontario Court of Appeal's decision in *Matthews* v. *Algoma Timberlakes Corporation*,[1] with no explanation or pleadings as to how this case pertains to this case. However, as the Respondent's Legal Counsel was aware of the Applicant's proposed argument, he consented to hold the hearing on its merits, rather respond to a refiled application.

2. Although the Applicant became belligerent and disruptive upon the initial dismissal, when the application was recalled, he was extremely apologetic and conducted himself appropriately for the balance of the hearing. As a result and in light of his disclosed health concerns that had contributed to his initial anxiety, the costs ordered are rescinded.

Factual Background

1. The Applicant moved into the complex on July 5, 2013. He owns the 'park model' trailer and rents the space where it rests from the Respondent. He pays approximately $600.00 in monthly rent in addition to fees for hydro, propane and sewage provided by the park. The Respondent also charges Harmonized Sales Tax (H.S.T.) on the monthly rent. While the unit was once mobile, its wheels have since been removed and a skirt wrapped around the lower exterior according to photographs submitted at the hearing. The trailer currently rests on railway ties.

2. He maintains another permanent residence elsewhere for at least two months of the year as the park is closed between January 1 and March 1 every year. During that period, no

[1] [2010] 102 O.R. (3rd) 590 (Ont. C.A.) (hereinafter '*Algoma*').

one other than a caretaker member of the Respondent's staff resides in the park. The entrance to the park is barred with a gate and several signs indicated that no entry is permitted during the closed season. Pass cards held by residents are rendered inoperative. Roads within the park are not constructed for residential use and facilities such as the outdoor pools and hot tubs, horse shoe pits, public washrooms and a meeting hall are closed and unavailable during the closed season from January 1 to March 1. While laundry facilities and the meeting hall are open during the "off-season" between October and the end of December, nothing is open during the subsequent "closed season." Most importantly, water service to the units is discontinued during this period.

3. While it is possible for a resident to access the park during the closed season in the event of an emergency, they may only do so in the company of a staff member and with prior permission. No resident is permitted to spend the night in the park between January 1 and March 1 and the Respondent's employees police the grounds to ensure compliance with this restriction. No day use is permitted.

4. While some residents only spend six months per year in the park, the Applicant typically resides there for ten months each year. The precise date that residents must leave can be somewhat flexible under certain circumstances. For instance, in 2014, he did not leave until January 5, 2014 due to health complications. But for these exceptional circumstances, I find based on the evidence that the Applicant would have been compelled to vacate the park on or before January 1, 2014.

5. While the Applicant's trailer is structurally capable of habitation during the winter, as the park is closed, the supply of hydro and propane is discontinued until the park reopens.

6. The Campsite Contract signed by the parties on July 9, 2013 clearly sets out the period during which the park is closed. The residents including the Applicant must provide the Respondent with a permanent address to ensure that that they are not using the park as a year round residence. All residents are advised upon entering into their contract with the park that they must vacate the park for a minimum of sixty consecutive days each year.

7. Similarly, the Applicant signed a winterizing service agreement with the Respondent on December 2, 2013 that sets out the fees for blowing out the pipes, draining water and other procedures for ensuring that the trailer will not be damaged by low temperatures during the winter months. On this contract, the Applicant must indicate the date that he expects to return to the unit. On the 2013 contract submitted at the hearing, the Applicant indicated that he would return to the park on March 3, 2014. The Applicant had a full opportunity to review these contracts prior to signing them and indicated a full comprehension of their implications at the hearing.

8. The park itself is subject to zoning By-law No. 05-70, from the City of Waterloo that limits residence in the park to seasonal use. Section 1 of the By-law requires that the park remain closed for at least sixty continuous days between October 31 and April 30 of the following year and that the park shall not include any permanent or year round residences.

9. B.M. was present when the Applicant reviewed the Rules including the By-laws prior to signing his contract with the park on July, 2013. B.M. testified that these restrictions have

been in place without any changes since at least 2005 and he has never been compelled to fine any resident for a violation.

The Law

10. As with most applications to determine whether the Act applies to such communities as mobile home parks such as the present application, the inquiry turns on the application of the exception to the Act's jurisdiction in subsection 5(a):

> This Act does not apply with respect to,
>
> (a) living accommodation intended to be provided to the travelling or vacationing public or occupied for a seasonal or temporary period in a hotel, motel or motor hotel, resort, lodge, tourist camp, cottage or cabin establishment, inn, campground, trailer park, tourist home, bed and breakfast vacation establishment or vacation home;

11. The above wording has remained substantially unchanged from the two predecessor statutes, the *Landlord and Tenant Act, 1990* and the *Tenant Protection Act, 1997* (the 'T.P.A.') both as amended.

12. The Courts' analysis with regard to the application of subsection 5(a) and its predecessor exemptions has shifted over time and crystallized with the Ontario Court of Appeal's decision in *Algoma*. However, even in earlier decisions, the analysis centered on the actual contract between the parties, rather than any conduct that existed contrary to that agreement.

13. In earlier decisions, the Courts focussed primarily on the "travelling or vacationing public" aspect of the exemption. For instance, in *McCormick* v. *Paul Bunyan Trailer Camp Ltd.*[2], the Superior Court of Justice confirmed the then Ontario Rental Housing Tribunal's (the 'Tribunal') decision that the T.P.A. did not apply to the residents because they did not live in the camp twelve months of the year and their trailer homes did not constitute mobile homes. The Tribunal defined trailers and trailer parks through reference to CSA standards for mobile homes. The residents had entered a contractual arrangement with the respondent Camp pursuant to which they were entitled to reside at the trailer camp from Easter to Thanksgiving each year. All of the residents inhabited trailers as opposed to mobile homes as those terms were understood under the CSA standards. The trailers did not have water and sewage systems that could operate year-round. In other words, the case turned on where the residents lived versus where they spent their vacations. The Court found that they vacationed rather than resided at the respondent's camp.

14. In *Rogers* v. *Fisherman's Cove Tent & Trailer Park Ltd.*[3], the Superior Court agreed with the Tribunal Member that the T.P.A. did not apply. The Tribunal member found as a fact:

    a. that the Tenants did not live in the unit as a permanent residence. Rather, they used the unit as a seasonal or temporary residence;

[2] [1999] O.J. No. 5784 (hereinafter '*McCormick*').
[3] [2002] O.J. No. 5942.

b. that the unit was occupied for seasonal or temporary periods, and,

c. that Fisherman's Cove was a campground and trailer park as set out in subsection 3(a) of the T.P.A.

15. The Appellants argued, however, that the Tribunal erred in law in failing to consider the intention of the parties - particularly the Rogers - with respect to occupation for seasonal or temporary periods. The Court disagreed, holding:

> To interpret section 3(a) in the fashion urged on us by the Appellants would entail incorporating the words "intended to be" before the words "occupied for a seasonal or temporary period" in the provision. We do not read the provision in that fashion. In our view section 3(a) should be read as dealing with "living accommodation intended to be provided to the traveling or vacationing public ..." and "living accommodation occupied for a seasonal temporary period ..." ***The latter focus is a focus on the fact of occupation rather than on the fact of intention to occupy*** [Emphasis added].

16. In *Hadlow* v. *M.S.V. Holdings*, the Tribunal considered the question of whether adding permanent additions to their trailer changed the nature of the relationship between the parties and thereby afford the residents the protections of the T.P.A.[4] As the Member stated:

> I shall set out law later that just by a tenant unilaterally physically changing an area rented it does not change the lease arrangement of the area. So by making a trailer look more like a mobile home to thus try to squeeze the structure into the definition of mobile home under the TPA this does not change the relationship between the Landlord and the Tenant. Nor if the outside looks are changed of the unit so it looks similar to a mobile home the relationship does not change.5

17. In *Hadlow*, the addition of physical upgrades, water and winter rates did not alter the underlying contractual relationship between the parties that the complex was primarily for seasonal residence, despite additional costs applied to those who stay longer. As in the present case, the addition of semi-permanent alterations to the trailer cannot change the original contractual intent of the parties.

18. In SOT-01217, dated October 8, 2008, the Member found the following amongst other factors, with regard to the residence in that application:

a. It was used temporarily and not permanently;

b. The parties agreed that the rental unit was not a mobile home;

c. The residential address given by the Tenants was that of their home in Toronto.

19. The Member found that there was no intention by either party that the rental unit would be used as the Tenants' sole, principal or permanent residence. As in *McCormick*, where a trailer was to be used only seasonally, it will be exempt from the Act.

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[4] [2001] O.R.H.T.D. No. 106 (Ontario Rental Housing Tribunal) (hereinafter, '*Hadlow*').
[5] *Supra* at para. 41.

20. As mentioned above, the legal analysis of exemption under subsection 5(a) was refined by the Court of Appeal in their decision in *Algoma*. In that case, the applicants each leased land from the respondent's predecessor and erected cottages which they used as year-round second homes. When the respondent acquired the land, it sent eviction notices to some lessees and gave notices of significant rent increases to others. It also purported to replace the leases with licences which gave it an unfettered discretion whether to renew the licence upon its annual expiration. The applicants brought an application for a determination that the Act applied to their land lease community. The Landlord and Tenant Board (the 'Board') dismissed the application. The Divisional Court dismissed the applicants' appeal, holding that the premises in question were not "residential" because they were used for recreational purposes. The applicants appealed.

21. In its decision, the Court of Appeal ended the distinction between vacation and residential property, but again focussed on the contractual intent of the parties. The Court held that all residential properties, including those used by tenants for recreational as well as residential purposes, are subject to the Act. The cottages in question were "living accommodations" used or intended for use as "rented residential premises." Occupants of residential units are entitled to the protection of the Act, whatever they do inside or outside of their premises during their waking hours and regardless of whether they live in the accommodation 52 weeks a year or some lesser amount of time, or whether the unit in question is their primary or secondary residence. The Court ultimately held that Act applied to the cottages in question.

22. I find that the fact scenario in *Algoma* is distinguishable from the present facts. The recreational leases in *Algoma* were written with a twenty year less a day lease with a renewable term of one year. Also, the evidence established that the leases were intended to be continually renewed over a long period of time. All of the leases provided for payment of rent on an annual basis. The Court noted that the cottages in *Algoma* were "built for the long term to be used all year" and that "most of the cottages were insulated and heated for winter use. Photographs of the appellants' cottages showed they were largely carefully constructed dwellings of significant substance."[6]

23. Most importantly, unlike the present situation, in *Algoma*, the Landlord never contractually restricted access, seasonally or otherwise. Other factors as summarized by the Court demonstrated that the fact situation in *Algoma* was completely contrary to the present application:

> First, in my view, the undisputed evidence is that the premises were occupied for more than a temporary period and for more than a seasonal period. The premises were occupied over many seasons, months and years. The evidence establishes that the leases were intended to be continually renewed over a long period of time. Moreover, all the leases provided for payment of rent on an annual basis. There was no seasonal or temporary rental rate. Accordingly, in my view, the s. 5(a) exclusion regarding "seasonal or temporary" occupation does not apply.[7]

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[6] *Supra*, note 1 at para 10.
[7] *Ibid.* at para. 34.

24. The Court ultimately found that the accommodation in *Algoma* was not akin to the hotel, resort, campground or vacation home temporary lodgings that the legislature intended to exclude from the application of the Act.[8]

25. This emphasis on the contractual intentions of the parties continued in Board decisions such as SWT-10443-10, dated September 16, 2010. In that case, the Member found that the Act did not apply to the residence due to the following factors:

    a. The applicants' trailer was not their permanent residence. As the time of the hearing, they also resided permanently in Bayfield, Ontario and also in Florida.

    b. The parties entered into a contractual arrangement, in which the applicants were entitled to occupy their trailer from about May 1 to October 31 each year.

    c. Each year, the trailer was winterized. The applicants were not allowed to stay in the trailer during the winter.

26. These same factors apply to the present case as the Applicant must vacate the unit to his permanent residence during a similar closed season when he is contractually prohibited from residing in his trailer.

27. Similarly, in CET-18301-11-RV, dated September 19, 2012, the reviewing Member cited a seasonal restriction as in the present case to distinguish that living accommodation from that in *Algoma*. Focussing on the contractual intent of the parties, the reviewing Member noted that in CET-18301-11-RV, "occupancy was specifically prohibited between October 15 and the opening of the park in springtime and was meant for 'recreational vacation purposes.'" The reviewing Member therefore concluded that the exemption in subsection 5(a) of the Act applied as the park provided to the "vacationing public" and was "occupied for a seasonal or temporary period" in a "trailer park." In the present case, the By-Laws also prohibit occupation during the closed season.

28. The issue of breaching a condition of the contract was addressed in NOL-11123-13, dated November 7, 2013. The Landlord in that case required that if residents intended to reside in their units during the winter season, they must check in with the management upon arrival. The Member found that this notification term in the contract imposed "an important condition precedent to mutually intended year-round occupation." As the resident did not contest the Landlord's evidence that she failed to notify the Landlord of her arrival prior to winter occupation, the Member found that the condition precedent had not been satisfied and that the living accommodation was exempt from the act pursuant to subsection 5(a) of the Act.

29. Lastly, both parties relied on Superior Court's decision in *Leduc* v. *Glen Echo Park Inc.*[9] The Applicant stressed that this case stood for the principle that there could be a vast difference between the terms of the contract and what actually occurred in practice within a residential complex. *Leduc* was an appeal by the tenants from a decision of the Board's

[8] *Ibid.* at para. 35.
[9] [2011] O.J. No. 6146 (hereinafter *Leduc*).

decision finding that they had no residential tenancy relationship with the respondents. The respondents operated a nudist camp. The appellants were members of the camp and had paid an additional fee in order to erect structures on the land. In 2009, when the property was sold, they were asked to leave. They argued that this constituted an eviction and that their security of tenure and other rights as residential tenants had been violated. The Board determined that the Act did not apply because the property in question was not the subject of a residential tenancy.

30. While the Board Member noted that some of the structures were solid, affixed to the ground and described as permanent, he held that the permanency of the structures was not an issue for him; rather it was whether they were residential.

31. The Board found that the official policy of the camp was that no one was to stay over the winter and that the owner closed down water and other communal facilities in the campground areas, but that nonetheless some people did stay in their dwellings through the winter.

32. The Board found that the living arrangements in the park bore little resemblance to a residential tenancy. He found that fees were paid for membership in the park and that members could and some did pay an additional fee for the privilege of erecting a shelter that was supposed to be temporary. Members had to pay a fee for any guests. G.S.T. was charged on all fees, which is not applicable to rent.[10]

33. Ultimately, *Leduc*, like the other cases submitted, demonstrates that the proper analysis to determine whether the Act applies to living accommodations such as in the present application necessitates a close examination of the intent of the parties as illustrated in the contract that exists between them. While the residents in *Leduc* strayed from the terms of their agreement with the owner, the terms of their contract revealed a living arrangement highly dissimilar to that of a landlord and tenant relationship. It was the preponderance of these differences rather than the residents' actions in erecting permanent structures that exempted them from the Act. In addition, although the residents stayed the winter, they were not authorized to do so. Whether or not the management chose to enforce the terms of the contract does not negate the existence of the prohibition.

Analysis

34. The Applicant took the position at the present hearing that the relationship between the parties should be construed as a Landlord-Tenant relationship as it is physically possible for the Applicant to reside in the unit through the year, but for the Respondent's policy prohibiting year round use. While the Applicant's Legal Representative characterized the residence as a permanent structure, I do not find that the evidence presented at the hearing supports this view. The Applicant referred to the trailer as a "park model" and did not provide evidence of any additions to the trailer itself that rendered the structure as permanent, beyond the removal of the trailer's immediate capacity to be moved.

[10] *Ibid.* at paras. 25-26.

35. However, whether or not the Applicant added or altered the trailer to become semi-permanent in nature is not material to whether the unit is a seasonal residence. The intent of the parties was that the park may not be used as a year round permanent residence. Simply because it is theoretically possible to violate this contract does not in any way invalidate it. In other words, although I find it would be possible for the Applicant to stow away in his trailer and survive the winter all the while evading park security, I do not find that such a breach of his contract would change the relationship between the parties or thereby confer on him protection under the Act.

36. The contract signed by the parties explicitly states the temporary and seasonal nature of the residential complex, specifically that:

> The Camper shall not use the Campsite as a principal, permanent, year-round or full-time residence, and shall close and vacate the unit on the Campsite for a minimum of sixty (60) consecutive days annually between October 31 and the following April 30 (the 'Minimum Vacancy Period"). **The Park will be CLOSED annually from January 1 through to March 1** [emphasis in original].

37. In light of all of the evidence before me, I find that the residential complex is intended to be provided to the travelling or vacationing public or occupied for a seasonal or temporary period, and as a result, exempted from the Act, pursuant to subsection 5(a) of the Act. The Act therefore does not apply.

January 23, 2015
Date Issued

Kevin Lundy
Member; Landlord and Tenant Board

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