

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
2248169 Ontario Inc.)	L. Jemark Earle, Counsel for the Applicant
Applicant)	
)	
– and –)	
)	
Ruth Gamble, Ron O’Neil and Carolyn O’Neil)	
Respondents)	Paul S. Bragagnolo, Counsel for the Respondents
)	
)	HEARD: December 2, 2024

DECISION ON APPLICATION

STOTHART J.

Overview

[1] The applicant 2248169 Ontario Inc (“224”) brings this application seeking the following orders:

- a. An order for vacant possession of two properties located at 3096 Rosegrove Road, and 3102 Rosegrove Road (the “properties”);
- b. Judgment for possession of the properties;
- c. An order requiring the respondents to vacate the properties within 30 days of the order;
- d. An order that the applicant be at liberty to issue a writ of possession in relation to the properties, directed to the Sheriff of the Regional Municipality requiring the Sheriff to put the applicant into possession of the properties; and
- e. Costs, plus applicable taxes.

Background

[2] Brian Hayes is the owner and director of 224. In August 2010, the applicant company purchased property bearing the Property Identification Number (PIN) 61243-0424 (“the land”). At the time, there were no encumbrances or leases registered on title under the *Land Titles Act*, R.S.O. 1990, c.L.5. Hayes states that while he observed several cottages on the property prior to purchase, he made inquiries of the previous owners, Jeff and Erin Flichel (the “Flichels”), who assured him that there were no leases or other encumbrances attached to the property. The Flichels signed a sworn Vendor Combined Declaration to that effect at the time of the purchase and sale of the property.

[3] Hayes states in his affidavit that after 224 purchased the lands, he requested that the respondents produce documentation evidencing their right to occupy the properties and he received no response. In September 2010, Hayes sent letters to the cottagers advising them that he and his wife were the new landowners of the land they were living on, and they had “researched and concluded” that no lease has been recorded for the cottages. Hayes requested that the cottagers produce any documents to prove their right to live on the property. Hayes also requested that the cottagers not do any work to the property and asked that they acquire liability insurance while using the cottage.

[4] In his affidavit, Hayes states that in 2017, the applicant severed the land into eight lots, bearing PINS 61243-0448 to 61243-0455. Each lot contained a pre-existing cottage on it with some families occupying the properties. During the time of the applicant’s ownership of the property, there were four families occupying the cottages: the Lafrance family, the Montague family, the Gamble family, and the O’Neil family. During the time of the applicants’ ownership, none of the families occupying these cottages had been paying for the use of the lands.

[5] Following severance, Hayes offered to sell the lots to the families who had been occupying them. The Montague family purchased the lot that they had been occupying. The Lafrance family vacated their lot. Hayes demanded that anyone who did not purchase a lot, leave the property they occupied.

[6] On March 5, 2018, Hayes sent Gamble a letter offering to sell her the lot for \$140,000. If she did not purchase the lot, she would have to leave. In response to this, Gamble retained a lawyer. There is evidence that in 2018 counsel for Gamble corresponded with counsel for the applicant advising that Gamble had a valid lease for her portion of the property and provided a copy of the assignment of lease.

[7] Hayes states that on April 19, 2020, he spoke to Carolyn O’Neil and told her that she had not been paying taxes on the property for the last ten years. She refused to reimburse the applicant for the taxes it had paid since becoming the registered owner of the property.

[8] When the O’Neils and Gamble refused to leave their cottages, the applicant sent them letters on July 14, 2022, and May 16, 2023, demanding that they vacate the properties, or it would take legal action against them. Following the demand letters, the O’Neils produced a copy of their assignment of lease. This assignment refers to a 99-year lease that began on July 18, 1944.

[9] The O'Neils state that they received their tenancy assignment from Carolyn O'Neil's father on August 7, 1996. They have provided evidence of the history of occupancy of the O'Neil property commencing from the originating lease agreement from July 18, 1944, to present day. They have also provided a copy of the lease which provides for a 99-year term and stipulates the terms of the lease, including payment obligations, and the rights and entitlements of the tenant and occupant. The lease provides that it can be assigned or sublet without leave.

[10] Ruth Gamble states that she received her tenancy assignment on June 1, 1984, when she purchased it from Maria Forcellini. She has produced her assignment agreement. At the time the lease was assigned, it could not be located, and so she is unable to produce a copy. Gamble advises that she provided the Flichels with a copy of her assignment of lease when they requested a copy in 2004.

[11] The respondents have provided evidence of various payments made towards their leased properties, including taxes, hydro, the installation of a septic system, and other renovations. Ruth Gamble is a senior citizen and has lived at the property as her principal residence for about 40 years. The O'Neils have used the property recreationally in the summer and occasionally in the winter.

[12] Both the O'Neils and Gamble state that at some point they stopped receiving their tax bills. This appears to be the result of a change in policy by the municipality sometime around 2004. The respondents agree that they did not contact the owner of the property about the issue of taxes after they stopped receiving the tax bills. There appears to be no evidence that the owner at the time asked that the taxes be paid.

[13] Ruth Gamble has provided documentary evidence that she has paid municipal taxes with respect to her property between 1981 and 2004. Gamble has also paid for hydro, and between 1990 and 1992, she renovated her home, including installing a septic tank that was approved by the local health unit.

[14] Gamble has not been able to find a copy of her lease and agrees that she may never have seen it when she paid for the assignment of the lease. At the time she purchased the assignment, she retained legal counsel who deal with the purchase of the lease. Gamble states that at some point she tried to register her lease but was told the property owners would not agree to this.

[15] Both parties accuse the other of non-compliance with the terms of the lease.

[16] The parties appear to agree that if the Flichels told the applicant that they were not aware of any lease, they were not honest. Gamble has produced a letter from the Flichels dated August 30, 2004, in which they advised her that after their purchase they received her name from the Local Services Board as a "cottage lease" on the property. They advised that they had been unable to obtain a copy of the lease from the previous owner or from the Land Registry Office in Haileybury because the lease had never been registered. They asked Gamble to provide them with a copy of her lease for their records, and to be added to her current property liability policy. In the letter they wrote "It is our understanding there has been conflict with regards to this lease in the past and

would like to avoid further conflict if possible”. Gamble states that she gave the Flichels a copy of her assignment of lease after receiving this letter.

[17] The O’Neils currently occupy Lots 7, 8, and 9, municipally known as 3096 Rosegrove Road. They refuse to leave.

[18] Ruth Gamble currently occupies Lot 4, municipally known at 3102 Rosegrove Road. She refuses to leave.

The position of the parties

[19] The applicant submits that the respondents are “squatters” and should be required to leave the property. When the applicant purchased the property there were no leases registered on the property. As such, pursuant to s.44(1) of the *Land Titles Act*, they took the land without any encumbrances and the leases are unenforceable.

[20] The applicant submits that the respondents have not produced valid leases. Gamble has not been able to produce a copy of her lease. The lease provided by the O’Neils is unenforceable due to ambiguity and they have been in breach of its terms.

[21] The respondents submit that this application should be converted to an action. They assert that they are tenants in occupancy of the portions of the property they currently occupy by virtue of a valid lease assigned to them. They challenge the applicant’s assertion that they did not know about the leases. It would have been obvious to the applicant when it attended the property prior to purchase that it contained cottages and a full-time residence.

[22] The respondents submit that as tenants, the dispute between the parties is governed by the *Residential Tenancies Act*, 2006 S.O. 2006, c.17 and is properly before the Landlord and Tenancy Board, not the Superior Court of Justice.

Legal principles

The Land Titles Act

[23] A bona fide purchaser for value, who does not have actual knowledge of a prior agreement, will be protected if a lease is not registered under the *Land Titles Act*. However, an exception to this is actual notice of the agreement: *Sandhu v. Paterson*, 2016 ONSC 1748 at para. 38.

[24] The burden of proving lack of notice is on the person alleging that they are a purchaser for valuable consideration without notice of the lease. A person has actual notice if “she or he is aware of the existence of a legal right.” It is not necessary that the person have knowledge of the precise details of the right: *Sandhu*, at para. 40.; *Bank of Montreal*, 2008 CanLII 28435 (ONSC) at para. 52.

[25] A purchaser will not be protected by the *Land Titles Act* if they were wilfully blind to the existence of a lease in order to avoid actual knowledge of a particular interest: *Sandhu*, at para. 43.

[26] If the purchaser “shuts his/her eyes to the facts presented to him/her and puts the suspicions aside without further inquiry” or “refrains from asking questions because he/she suspects there is something wrong” the purchaser will have been wilfully blind to the issues: *Cybernetic Exchange Inc. v. J.C.N. Equities Limited*, 2003 CarswellOnt 4762 (S.C.J.) at para. 232; *Little Shoe Palace v. Pelmark Developments Ltd.*, 2017 ONSC 5268 at para. 64.

When should an application be converted to an action

[27] In determining whether an application should be converted to an action, the following factors are considered: whether there are material facts in dispute; the presence of complex issues requiring expert evidence and/or a weighing of the evidence; whether there is a need for the exchange of pleadings and for examinations for discovery; and the importance and impact of the application and of the relief sought: *Fort William Indian Band v. Canada (Attorney General)* [2005 CarswellOnt 2288 (Ont. S.C.J.)], 2005 CanLII 19819 at para 5; *Przysuski v. City Optical Holdings Inc.*, 2013 ONSC 5709 (Ont. S.C.J.) at para 10.

[28] In *Fort William Indian Band*, the court set forth the following general principles in determining whether an application or an action is the appropriate originating process:

1. An application should be used when there is no matter in dispute and when the issues to be determined do not go beyond the interpretation of a document;
2. If the judge who will hear the matter cannot make a proper determination of the issues on the application record, there is good reason to convert an application into an action:
3. If issues of credibility are involved, or when *viva voce* evidence is required, a matter should proceed by way of an action; and
4. The involvement of a factual dispute *simpliciter* is not sufficient reason to convert an application into an action. The facts in dispute must be material to the issues that are before the court.

Analysis

[29] In this case I find that there are material issues in dispute between the parties surrounding whether there is a valid lease and whether the applicant would have been on notice or wilfully blind with respect to the existence of a lease affecting the lands. In my view, these issues are better determined through the hearing of *viva voce* evidence: *Lacey v. Kakbeka Falls Flying Inc*, 2023 ONCA 83, at para. 7.

[30] With respect to the existence of a valid lease, this will have to be determined by a court after hearing the conflicting evidence of the parties. The O’Neils have produced a lease. Gamble has produced an assignment of lease and may be able to establish a valid lease through witness testimony given that she does not have the actual lease itself.

[31] With respect to the application of the *Land Titles Act*, the evidence is that Hayes attended the property and saw the existing cottages on the various lots. Those structures would have included the full-time residence occupied by Gamble. There is no evidence that Hayes or anyone else on behalf of the applicant, spoke to the occupants of any of those cottages or the permanent residence, to determine the basis of their occupancy prior to the applicant's purchase of the property. I find that there is a triable issue with respect to whether the applicant was wilfully blind to whether the occupants had valid leases with respect to the property prior to its purchase.

[32] I cannot make a determination on the issues based on the application record. There is no affidavit material from the Flichels with respect to what they told the applicant. The applicant suggests that the Flichels were dishonest in their interactions. The Flichels may have another version of events surrounding the issues of knowledge and wilful blindness.

[33] I find that issues of credibility are involved in this matter, and that certain issues in dispute will need to be addressed by way of *viva voce* evidence that is subjected to cross-examination. Ultimately it will be up to a trial judge to determine what the disputed facts are and apply those factual findings to the law surrounding notice and wilful blindness.

[34] The impact of this application and the relief sought is highly important, particularly to Ruth Gamble, who has lived in her home on the property, full time and without any issue, for over 40 years. These proceedings will potentially result in Gamble, a senior citizen of modest means, losing her home.

[35] As such, I find that the application should be converted to an action.

Conclusion

[36] For these reasons I order that the application CV-23-11353 be converted to an action.

[37] If the parties are unable to come to an agreement with respect to issue of costs related to this hearing, the respondent shall provide written submissions on the issue of costs within 15 days of the release of this decision. These written submissions shall be no more than 2 pages in length. The applicant shall provide responding written submissions 15 days after the receipt of the respondent's submissions. These written submissions shall be no more than 2 pages in length.

The Honourable Madam Justice S.K. Stothart

Released: January 13, 2025

CITATION: 2248169 Ontario Inc. v. Gamble, 2025 ONSC 253
COURT FILE NO.: CV-23-11353
DATE: 2025-01-13

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

2248169 Ontario Inc.

Applicant

– and –

Ruth Gamble, Ron O’Neil and Carolyn O’Neil

Respondents

DECISION ON APPLICATION

S.K. Stothart J.

Released: January 13, 2025