

CITATION: Atkinson Housing Co-operative Inc. v. Osorio, 2024 ONSC 5395
COURT FILE NO.: CV-24-00721454-0000
DATE: 20241001

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Atkinson Housing Co-operative Inc., Applicant

-and-

Hector F. Osorio, Respondent

BEFORE: Robert Centa J.

COUNSEL: Timothy M. Duggan, for the applicant

Celso Sakuraba, for the respondent

HEARD: September 26, 2024

ENDORSEMENT

- [1] The Atkinson Housing Co-operative brings this application for a declaration that no member of the non-profit co-op occupies a three-bedroom townhouse located in Toronto and for a writ of possession of the member unit. The respondent, Hector Osorio, submits that he is a member of the co-op and is entitled to occupy the member unit. He requests that the application be dismissed.
- [2] There is no merit to Mr. Osorio's submissions. He is not a currently member of the co-op and has not been a member since 2011. He is not entitled to occupy the member unit. The co-op is entitled to a writ of possession.

Facts

- [3] In 2023, the Landlord and Tenant Board found that Mr. Osorio was not a member of the co-op and ordered that he be evicted from the member unit. Mr. Osorio appealed the Board's decision to the Divisional Court. Justice O'Brien allowed his appeal. In the decision, O'Brien J. described the key facts as follows:

[2] The appellant used to be a member of the co-op. He lived in the unit with his former spouse from 2005 to 2011. He left the unit in approximately August 2011 because of a restraining order against him associated with domestic violence. His ex-spouse continued living in the unit. The Board found that in 2018, the appellant provided the co-op with written confirmation that he had not resided

in the unit since August 2011 and that he agreed to resign his membership with the co-op.

[3] In March 2022, the co-op discovered the appellant's ex-spouse had moved out of the unit in February 2021. It also had information the appellant was living in the unit, but he had not applied to be reinstated as a member of the co-op. The co-op then started an application against the appellant's ex-spouse to terminate her occupancy of the unit because it was abandoned.

[4] In its first decision, dated April 26, 2023, the Board concluded the appellant's ex-spouse had abandoned the unit and that, since the appellant was not a member, he had no right to occupy the unit. The Board ordered the unit to be vacated by May 7, 2023.

[5] The appellant then filed a request for review, arguing that he was not able to participate in the hearing because the notice of hearing was not addressed to him. The request for review was referred to a hearing, which took place on September 28, 2023. After hearing from the appellant, the Board concluded that the appellant had resigned his membership with the co-op in 2018. Because he was not a member, he did not have standing to participate in the April 26 hearing. The request for review therefore was denied.

[6] The appellant made a further request for review, which was denied because he had not provided a basis to waive the Board's rule providing it would not consider a further request to review the same order from the same party.¹

[4] Justice O'Brien dismissed four of Mr. Osorio's grounds of appeal and held that:

- a. the Board correctly determined that non-tenant occupants, like Mr. Osorio, were not entitled to notice of a hearing before the Board;
- b. the Board's decision that Mr. Osorio was not a member of the Board was a finding of fact or mixed fact and law and could not be appealed;
- c. there was no merit to Mr. Osorio's submission that the Board failed to consider whether his notice to resign his membership was valid; and

¹ *Osorio v. Atkinson Housing Co-operative Inc.*, 2024 ONSC 2631.

- d. Mr. Osorio did not have standing to claim that the Board could not evict his ex-spouse.

[5] Justice O'Brien, however, allowed Mr. Osorio's appeal because the Board had no statutory jurisdiction to evict a non-member from the co-op. Justice O'Brien explained that the Board only has the statutory authority to terminate the occupancy rights of people who were members of co-ops. The co-op conceded, and O'Brien J. held that the Board does not have jurisdiction to terminate the occupancy rights of non-members who are residing in member units as unauthorized occupants:

[9] The respondent concedes for the purposes of this appeal that the Board did not have jurisdiction to evict the appellant when it found he was not a co-op member. This appears to be correct on the face of the relevant legislation. The issue was not put to the Board in this matter, but the Board previously has held the *Residential Tenancies Act, 2006*, S.O. 2006, c. R. 17 (*RTA*) does not provide it with jurisdiction to evict an unauthorized occupant from a co-op: *TSC-00659-16 (Re)*, 2016 CanLII 25272 (ON LTB), at para. 8. Merritt J. recently adopted this position in *Neilson Creek Housing Co-Operative Inc. v. Vella*, 2024 ONSC 171, at para. 19, although the question of the Board's jurisdiction was not directly before her.

[10] Part V.I of the *RTA* authorizes the Board to terminate the occupancy rights of a member but does not expressly authorize termination of occupancy rights of non-members. Meanwhile, s. 171.13 of the *Co-operative Corporations Act*, R.S.O. 1990, c. C.35 (*CCA*) authorizes the court to declare a person's membership and occupancy rights to be terminated or that there is no member occupying the unit and to direct that a writ of possession be issued.

[11] Considering the relevant statutory provisions and in the absence of any argument to the contrary before me, I find the Board did not have jurisdiction to evict the appellant.

[6] For this reason, the co-op now brings this application pursuant to s. 171.13 of the *Co-Operative Corporations Act* and asks that the court declare that no member of the co-op is occupying the member unit and for an order issuing a writ of possession.² The subsection provides:

171.13 (1) After a person's membership and occupancy rights are terminated under section 171.8, or if there is no member occupying a member unit, the non-profit housing co-operative may apply to the court for an order,

² *Co-operative Corporations Act*, R.S.O. 1990, c. C.35.

(a) declaring that the person's membership and occupancy rights are terminated or that there is no member occupying the unit, as applicable; and

(b) directing that a writ of possession be issued.

- [7] As Merritt J. observed, an application for writ of possession to evict an unauthorized occupant of unit should be granted absent exceptional circumstances.³ The court may exercise its discretion not to issue a writ of possession where the decision of the co-operative was made in breach of the principles of natural justice and fairness, or made in bad faith, or was based on extraneous considerations or was an egregious breach of public policy.⁴

Mr. Osorio is not a member of the co-op

- [8] Mr. Osorio submits that the court should find that he is a member of the co-op and that, therefore, the court does not have the jurisdiction to issue a writ of possession pursuant to s. 171.13 unless and until the co-op terminates his membership and occupancy rights in accordance with s. 171.8. I disagree.

- [9] First, the Board found as a fact or as a question of mixed fact and law that Mr. Osorio is not a member of the co-op. The Board found as follows:

The Co-op had signed documentary evidence that [Mr. Osorio] resigned his membership officially as of 2018. The document also states that [Mr. Osorio] actually moved out in 2011, during a period of domestic disputes with his wife, AO. Therefore, I find, on a balance of probabilities, on the basis of the [rent geared to income] and rent assessment documentation, the documentary evidence of AO as sole occupant for a number of years, and the documentary evidence of [Mr. Osorio] resigning his membership, that he was not a Co-op Member on April 19, 2023. [Mr. Osorio] has not been a Co-op Member since he resigned in 2018.

- [10] It would be an abuse of process to allow Mr. Osorio to re-litigate that question before the court.⁵ Indeed, the only reason that O'Brien J. set aside the Board's order evicting Mr. Osorio in 2023 is because the Board found that Mr. Osorio was not a member of the co-op. Absent the Board's determination that Mr. Osorio was not a member, he would have been evicted from the unit in 2023. It would be an abuse of the court's process to permit him to litigate that question again.

³ *Neilson Creek Housing Co-operative Inc. v. Vella*, 2024 ONSC 171, at paras. 21 to 26.

⁴ *Tamil Co-operative Homes Inc. v. Kandiah*, 2003 CanLII 47096, at para. 14.

⁵ *Toronto (City) v. CUPE., Local 79*, 2003 SCC 63, [2003] 3 SCR 77, at paras 23 and 37.

- [11] I also do not accept Mr. Osorio's submission that the Board was considering a different issue than the one before me. The Board turned its mind to the precise question before me, considered the evidence provided by the co-op and Mr. Osorio, and concluded that he was not a member of the co-op.
- [12] In any event, I agree with the Board's decision and would reach the same conclusion if I considered the issue as a matter of first impression. Mr. Osorio vacated the member unit in 2011, which, pursuant to the co-op's bylaws, terminated his membership in the co-op. In addition, Ms. Winfield stated in her affidavit that on March 19, 2018, Mr. Osorio provided the co-op with a notice to vacate (dated February 26, 2018), which stated that he had vacated the member unit as of August 2011. In doing so, Mr. Osorio confirmed that he resigned his membership in the co-op pursuant to s. 10.1 and 10.3 of the co-op by-laws. It is important to recall that the relationship between the co-op and its members is defined by an occupancy agreement and the applicable occupancy by-law.⁶
- [13] I do not accept Mr. Osorio's late breaking evidence that his daughter "made" him sign this document, which he submits contains false information.
- [14] In June 2018, Mr. Osorio's former spouse provided the co-op with an updated household income and assets review form that stated she was the only occupant of the unit. This evidence is consistent with Mr. Osorio having vacated the unit.
- [15] In 2021, the co-op learned that Mr. Osorio had moved into the member unit and that his former spouse had moved out of the member unit. The co-op immediately advised Mr. Osorio that he was not a member of the co-op and that he would have to vacate the unit. He refused to do so.
- [16] I find that the evidence overwhelmingly supports the conclusion that Mr. Osorio vacated the unit in 2011, which terminated his membership in the co-op. In 2018, Mr. Osorio himself confirmed that he was no longer a member of the co-op and he has never been re-admitted to membership. If it were necessary to do so, I would have no hesitation in finding that Mr. Osorio is not a member of the co-op but currently occupies member unit.
- [17] I do not accept Mr. Osorio's submission that in 2024 the co-op can only terminate his membership in accordance with s. 171.8 of the *Co-operative Corporations Act*. That provision only applies to a situation where the co-op itself wishes to move to terminate the membership and occupancy rights of a current member. Because Mr. Osorio is not a member of the co-op, that provision does not apply to him. As his membership was not terminated pursuant to s. 171.8, the co-op may apply to the court under s. 171.13 for a writ of possession. The co-op does not need to proceed under s. 171.12.1. Again, he is a non-member, he vacated the unit and terminated his membership, and has no right to occupy the member unit.

⁶ *Neilson Creek*, at para 26.

The co-op is entitled to a writ of possession

- [18] I find that there is no reason not to grant the writ of possession. I see no hint of unfairness in the process followed by the co-op. This case is no different than the case of *Neilson Creek Housing Co-operative Inc.*, where the court granted a writ of possession.⁷
- [19] There is no unfairness to Mr. Osorio in this result. He has not had the right to live in the member unit for many years. He has known for three years that the co-op took the position that he was not a member and needed to vacate the unit. He has occupied a very valuable three-bedroom townhouse for those three years. There is no evidence of bad faith on the part of the co-op. While I am sure this result is upsetting to Mr. Osorio, the co-op is entitled to the relief it seeks.
- [20] For these reasons, I declare that Mr. Osorio is not a member of the co-op, that there is no member of the co-op occupying the member unit, and I direct that a writ of possession be issued. I decline to delay the issuance of the writ of possession.
- [21] If the parties are not able to resolve costs of this action, the co-op may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before October 8, 2024. Mr. Osorio may deliver his responding submission of no more than three double-spaced pages on or before October 15, 2024. No reply submissions are to be delivered without leave.

Robert Centa J.

Date: October 1, 2024

⁷ *Neilson Creek*, at paras. 28 to 36.