



Civil and Administrative Tribunal
New South Wales

Case Name: Nam v Zarb

Medium Neutral Citation: [2022] NSWCATCD 87

Hearing Date(s): 25 March 2022

Date of Orders: 15 June 2022

Decision Date: 15 June 2022

Jurisdiction: Consumer and Commercial Division

Before: D Moujalli, Senior Member

Decision: The application is dismissed.

Catchwords: LEASES AND TENANCIES – Where residential premises are part of strata premises - Tenant’s obligation in relation to common property of strata premises

Legislation Cited: Residential Tenancies Act 2010 (NSW)

Cases Cited: Curtis v Potter & Co Pty Ltd t/as The Africa Safari Co [2016] NSWCATAP 196

Texts Cited: Nil

Category: Principal judgment

Parties: Seung Yoon Nam (Applicant)
Aaron Zarb and Emma Deal (Respondents)

Representation: M Roberts (Agent) (Applicant)
Self-represented (Respondents)

File Number(s): RT 22/04477

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

- 1 On 2 February 2022 the applicant, as landlord of residential premises (the Landlord), lodged an application with the Tribunal against the respondents as the tenants of the premises (the Application). The applicant seeks an order for the payment of money or compensation under s 187(1)(c) or s 187(1)(d) respectively of the *Residential Tenancies Act 2010* (NSW) (RTA) on the basis that one of the respondents, namely Mr Zarb (the Tenant), caused damage to the common property of the strata premises in which the residential premises are located.
- 2 At the hearing on 25 March 2022, the Landlord was represented by a property manager and the Tenant appeared in person.
- 3 The hearing proceeded by telephone. At the hearing each party was given an opportunity to present their evidence, ask questions of the other party and make submissions.
- 4 The parties participated in the hearing in a respectful manner and the Tribunal is grateful for their assistance and co-operation in the conduct of the hearing.

Jurisdiction

- 5 The dispute between the applicant and respondents arises from their relationship as the landlord and tenants respectively under a residential tenancy agreement governed by the RTA. The Tribunal therefore has jurisdiction to hear and determine the matter pursuant to the powers granted to it under the RTA in respect of residential tenancy agreements.

Evidence

- 6 In determining the Application, the Tribunal has had regard to the following:
 - (1) The material filed by the applicant on 3 February 2022. This was marked Exhibit A1 at the hearing on 25 March 2022.
 - (2) Further material filed by the applicant on 15 February. This was marked Exhibit A2 at the hearing on 25 March 2022.
 - (3) The oral evidence and submissions of the parties at the hearing on 25 March 2022. It is noted that only Mr Zarb gave evidence on behalf of the respondents at the hearing on 25 March 2022.

7 The findings made by the Tribunal on the basis of the above evidence is set out below.

Assessment of the Evidence and Findings of Fact

8 The Landlord is the owner of a residential unit in SP96192 (the Unit). The strata premises are located in Penrith, New South Wales. The Tenant occupies the Unit.

9 The residential tenancy agreement between the parties (the Agreement) defines the residential premises to be the Unit, two car spaces and a storage cage.

10 Clause 16.4 of the Agreement provides:

The Tenant agrees not to intentionally or negligently cause or permit any damage to the residential premises...

11 Clause 57.9 of the Agreement provides that the Tenant is to:

...ensure that nothing is done on the residential premises which may expose the Owner to any claims or liability or which might give rise to an insurance claim...

12 Schedule A of the Agreement contains special conditions in relation to strata premises. Relevantly, there is no special condition that imposes on the Tenant an obligation in relation to common property of strata premises which is similar to that imposed by clauses 16.4 or 57.9 in relation to residential premises.

13 On or about 19 December 2021, the Tenant was entering the carpark of the strata premises.

14 The Tenant gave evidence as to what occurred on 19 December 2021.

15 The Tenant says that as he approached the driveway in his car the security door for the carpark was elevated so that it was clear for him to enter the carpark. There is a buzzer that can be pressed to open the security door if it is closed. However, as the door was open on this occasion the Tenant did not consider there to be any need to press the buzzer. He said that he had driven through the entry to the carpark on other occasions in this manner without difficulty.

- 16 As the Tenant entered the driveway the security door started to come down and made contact with the Tenant's car. The Tenant continued driving after the security door made contact with his car. He says he had no other option other than to continue driving. He says this is because the driveway dips down sharply. The driveway is for incoming and outgoing cars. The Tenant needed to focus his vision in front of him to ensure there were no cars leaving the carpark as he was entering it. He had to pay special care in this regard because the driveway is steep and limits visibility to notice an approaching outgoing car. He says that the security door came down on his car while it was out of his rear vision and while he was focused on the driveway directly ahead of him.
- 17 No other witness gave evidence in relation to the incident on 19 December 2021. Additionally, I have no reason to doubt the veracity of the Tenant's evidence. I therefore accept the Tenant's evidence as set out above.
- 18 The Tenant therefore contends that the incident was "out of my control". He also contends that there should have been a sensor to pick up the presence of a car in the driveway before the security door started to come down.
- 19 The Landlord's representative did not dispute much of the Tenant's evidence. As noted, there was no witness to contradict the Tenant's evidence so that the Landlord was not really in a position to challenge the Tenant's evidence as to how the relevant incident occurred.
- 20 The Landlord contends that the Tenant should have pressed the buzzer before the entering the driveway. The Tenant's response to this is that he saw no need to do so as the driveway door had been open for about 20 metres as he approached the driveway.
- 21 There is no dispute that the door to the carpark was damaged as a result of the incident on 19 December 2021. There is also no dispute that it has cost the Owners Corporation \$3,820.94 to repair the damage to the door to the carpark. The Owners have sought to recover this amount from the Landlord and the Landlord, in turn, now seeks to recover this amount from the Tenant.

Applicable Law

- 22 Section 51 of the RTA provides relevantly:

51 Use of premises by tenant

(1) A tenant must not do any of the following—

....

(d) intentionally or negligently cause or permit any damage to the residential premises,

...

23 By virtue of s 51(5) of the RTA, the obligations pursuant to s 51 of the RTA are terms of the residential tenancy agreement.

24 Section 190 of the RTA provides as follows:

190 Applications relating to breaches of residential tenancy agreements

(1) A landlord or a tenant may apply to the Tribunal for an order in relation to a breach of a residential tenancy agreement within the period prescribed by the regulations after the landlord or tenant becomes aware of the breach or within such other period as may be prescribed by the regulations.

(2) An application may be made—

(a) during or after the end of a residential tenancy agreement, and

(b) whether or not a termination notice has been given or a termination order made.

(3) A landlord's agent may make an application on behalf of a landlord.

Consideration

25 The Application seeks an order for payment under s 187(1)(c) of the RTA or alternatively an order for compensation under s 187(1)(d) of the RTA.

26 The Landlord has not identified any relevant duty which it is contended was breached by the Tenant so as to give rise to a liability on the part of the Tenant to the Landlord. The Tribunal is bound to determine claims in accordance with the general law and established legal principles: *Curtis v Potter & Co Pty Ltd t/as The Africa Safari Co* [2016] NSWCATAP 196 at [68]-[72]. As the Tribunal must determine the Application according to law, it is necessary to ascertain whether some relevant duty on the part of the Tenant was breached giving rise to a liability which would entitle the Landlord to an order pursuant to either to s 187(1)(c) or s 187(1)(d).

27 The obligations imposed on a tenant by s 51 of the RTA, especially s 51(1)(d), apply in respect of "residential premises". The door to the driveway did not constitute part of the residential premises the subject of the Agreement. As has

already been pointed out, the Agreement defined the residential premises to include the Unit, two parking spaces and a storage cage. No question can therefore arise as to whether the Tenant breached s 51 of the RTA which may have entitled the Landlord to an order pursuant to s 187(1)(c) or s 187(1)(d).

- 28 Turning to the Agreement, the same considerations as set out above apply, that is, the relevant obligations imposed on the Tenant by the Agreement relate to the use of “residential premises”. This is the case with clauses 16.4 and 57.9 of the Agreement and schedule A to the Agreement.
- 29 I have been unable to identify, and the Landlord did not rely upon, any provision of the Agreement which imposed obligations on the Tenant in respect of common property of the strata premises which could apply to the incident.
- 30 Even if the Tribunal is wrong in the above conclusion and there was some obligation on the part of the tenant in relation to the common property which was damaged in the incident on 19 December 2021, the Tribunal is not satisfied that any such obligation was breached.
- 31 The difficulty with assessing any breach by the Tenant is that the Landlord has not indicated the relevant standard of conduct, for example, whether the Tenant was subject to some strict liability or a requirement to exercise reasonable care in the circumstances. This arises from the absence of any identification of a relevant duty, whether statutory or contractual, which the Landlord contends the Tenant was subject to at the relevant time.
- 32 Having accepted the Tenant’s evidence as to what occurred on 19 December 2021, I do not consider that the Tenant failed to exercise reasonable care. It seems that the most that the Landlord can point to is that the Tenant failed to use the buzzer that opens the door to the driveway to the carpark. I do not consider that the Tenant acted unreasonably in this respect. The door was open as the Tenant approached the driveway and it appeared to the Tenant to be open from a distance of about 20 meters. The Tenant had previously entered the driveway in this manner without difficulty. There is no evidence that occupants of the strata premises had been notified to always use the buzzer irrespective of whether or not the door to the driveway was open.

33 The Tribunal therefore finds that the Tenant did not breach any statutory or contractual duty in relation to the incident which occurred on 19 December 2021 which could have given rise to a liability to the Landlord for the purpose of making orders pursuant to s 187(1)(c) or s 187(1)(d).

Orders

34 For the above reasons the Application is dismissed.

The image shows a handwritten signature in black ink to the left of a circular official seal. The seal features the text 'NSW CIVIL & ADMINISTRATIVE TRIBUNAL' around the perimeter and a central emblem with a shield and a crown.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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