

2005 CarswellOnt 7363
Ontario Superior Court of Justice (Divisional Court)

Jemiola v. Firchuk

2005 CarswellOnt 7363, [2005] O.J. No. 6085, 144 A.C.W.S. (3d) 552, 206 O.A.C. 251

John Jemiola, (Appellant) and John and Tamara Firchuk, (Respondents)

Epstein J., Lax J., Pardu J.

Heard: December 1, 2005

Judgment: December 2, 2005

Docket: Toronto 577/04

Counsel: Grace Vaccarelli, for Appellants
Frederick S. Kelman, for Respondents

Subject: Property

Headnote

Landlord and tenant --- Residential tenancies — Relationship of landlord and tenant

Appellant son lived with tenant mother in rental unit in 1973, 1974 or 1975 and in 1989 — When tenant became ill in 2001, son and granddaughter returned to live in rental unit so that son could care for tenant — Tenant died on June 9, 2004 and her July rent cheque was returned to landlords with notation "deceased" — On July 13, 2004, landlords sent letter to tenant c/o son, stating that as they did not have last month's rent for apartment, July rent cheque must be replaced, they assumed son would be vacating by end of July, and including notice to terminate early for non-payment of rent effective July 31, 2004 — Son paid July rent by bank draft, but did not indicate whether payment was made personally or on behalf of estate — Landlords learned that son did not intend to vacate and on July 29, 2004 applied to evict him as unauthorized tenant — Rental housing tribunal determined that son was not tenant, no tenancy agreement was created or implied, and tenant transferred occupancy of rental unit to son in manner that was not authorized by Tenant Protection Act, 1997 — As son and granddaughter were unauthorized occupants, they were ordered evicted — Son appealed — Appeal dismissed — Evidence was before tribunal that entitled it to conclude that implied tenancy agreement did not arise between son and landlords — Member was not prepared to characterize single payment of rent and July letter as amounting to agreement to create tenancy — Landlords acknowledged that son was living in unit, but legislation does not prohibit tenants from having room-mates, family and friends living with them and that that does not necessarily confer on them status of tenant — Tribunal's finding that son was not tenant and that no tenancy agreement was created were findings of fact or mixed fact and law, from which no appeal lies.

APPEAL by tenant's son from decision of Ontario Rental Housing Tribunal determining that he was not tenant and ordering him evicted as unauthorized occupant.

Per Curiam:

1 The appellant, John Jemiola, appeals two related orders of the Ontario Rental Housing Tribunal. The initial Order by Tribunal Member, Harry Fine, was issued on October 1, 2004. The Member determined that Mr. Jemiola was not a tenant, that no tenancy agreement was created or implied and that the tenant transferred the occupancy of the rental unit to the appellant in a manner that was not authorized by the *Tenant Protection Act, 1997*, S.O. 1997, c. 24, s. 81. As an unauthorized occupant of the rental unit, he and his daughter were ordered evicted.

2 The review Order by Tribunal member, David Hutcheon, issued on November 8, 2004, found errors of fact in the calculation of the daily occupancy rate, but otherwise upheld the eviction Order on the basis that the Member's interpretation of the relevant provisions of the Act was reasonable.

3 The appellant is the adult son of Gertruda Jemiola who was a long-time tenant of the rental unit at 648 Queen Street West. The appellant lived in the unit in 1973, 1974 or 1975 and 1989. In 2001, his mother was ill and living on her own. The appellant and his daughter returned to live in the rental unit so that the appellant could care for his mother. On June 9, 2004, Mrs. Jemiola died and her July rent cheque was returned to the landlords with a notation "deceased". On July 13, 2004, Peter Dunn, as agent for the landlords, sent a letter to Mrs. Jemiola, c/o the appellant expressing condolences and enclosing a Form N4 Notice to Terminate Early for Nonpayment of Rent effective July 31, 2004. The letter stated in part:

As you are aware, we do not have a last month's rent on deposit for this apartment, meaning that you must replace the July rent cheque as soon as possible.

We are assuming that you will be vacating the apartment by the end of July 2004, so at this time we will come in and change the locks and start to advertise to re-rent it. Please ensure that you clean the apartment of all your mother's belongings by the end of this month.

4 After receiving this letter, the appellant paid the July rent by bank draft, but it did not indicate whether the payment was made personally or on behalf of the estate. Before this, he had paid money to his mother, but the landlords were unaware of this. Toward the end of July, the landlords learned that Mr. Jemiola did not intend to move out. On July 29, 2004, they applied to evict him as an unauthorized tenant.

5 Under section 196(1) of the Act, a person may appeal an order of the Tribunal to the Divisional Court only on a question of law. Where there is a statutory right of appeal and the court is asked to review a tribunal's interpretation of a statutory provision, the Tribunal is not entitled to deference: *Samuel Property Management Ltd. v. Nicholson* (2002), 61 O.R. (3d) 470 (Ont. C.A.); *Dollimore v. Azuria Group Inc.*, [2001] O.J. No. 4408 (Ont. Div. Ct.). "Tenant", "Tenancy Agreement", and "Rent" are defined terms under the Act. On these questions, the appropriate standard of review is correctness.

6 The definition of "tenant" under the Act is:

a person who pays rent in return for the right to occupy a rental unit and includes the tenant's heirs, assigns and personal representatives, but "tenant" does not include a person who has the right to occupy a rental unit by virtue of being,

(a) a co-owner of the residential complex in which the rental unit is located, or

(b) a shareholder of a corporation that owns the residential complex;

7 A "tenancy agreement" is defined as:

a written, oral or implied agreement between a tenant and a landlord for occupancy of a rental unit and includes a licence to occupy a rental unit

8 "Rent" includes

the amount of any consideration paid or given or required to be paid or given by or on behalf of a tenant to a landlord or a landlord's agent for the right to occupy a rental unit ...

9 The definitions of "tenant" and "tenancy agreement" are broad and inclusive and should be broadly and liberally construed. The Court of Appeal has affirmed that the Act is remedial legislation with a "tenant protection focus" and that an expansive, liberal approach should govern its interpretation: *Metropolitan Toronto Housing Authority v. Godwin* (2002), 161 O.A.C. 57 (Ont. C.A.) at para. 19. While the legislation is intended to ameliorate the common law position of tenants, it nonetheless places legislative limits upon what facts can constitute a tenancy arrangement. Neither the Tribunal nor the court can read into the Act substantive rights that the Legislature has not provided.

10 The Member recognized the remedial nature of the legislation and his obligation to "ascertain the real substance of all transactions and activities relating to a rental unit" as required by s. 188 of the Act, but concluded that the Act could only be applied in its remedial nature to a tenant, and not to a mere occupant. He pointed out, for example, that section 26 of the Act distinguishes between a tenant and the members of his or her household. If all members of a tenant's household are to be afforded the status of tenant, the distinction made in this section is redundant. It is a trite law of statutory interpretation that every word in a statute must be given meaning.

11 The Member also recognized that a tenancy agreement can be implied, but he was "not convinced that the transactions and interplay between the landlord, the landlords' agents and Mr. Jemiola [created] an implied tenancy". The member found that the landlord knew and acknowledged that Mr. Jemiola and his daughter were living there, but this did not confer on them the status of tenants.

12 The fundamental submission of the appellant is that Member Fine failed to properly consider the evidence of the appellant that he had taken many of the obligations, responsibilities and benefits implicit in a tenancy and that he also failed to consider the conduct of the landlords' agents, which was indicative of a tenancy. The factual findings of the Tribunal are not subject to review. Whether or not there is any evidence is a question of law. What inferences can or should be drawn from some evidence is, at best a question of mixed fact and law: *Meredith v. Leboeuf Properties Inc.*, [2000] O.J. No. 209 (Ont. Div. Ct.); *Longhouse Villiage (Thunder Bay) Inc. v. Smolcec* (2001), 143 O.A.C. 137 (Ont. Div. Ct.). Our jurisdiction is limited to questions of law.

13 We are satisfied that there was evidence before the Tribunal that entitled it to conclude that an implied tenancy agreement did not arise between the appellant and the landlords. The Member was not prepared to characterize the single payment of rent and the July letter as amounting to an agreement to create a tenancy. The landlord and his agents acknowledged that Mr. Jemiola was living in the unit, but the legislation does not prohibit tenants from having room-mates, family and friends living with them. The Member found, correctly in our view, that this does not necessarily confer on them the status of tenant.

14 We find no error in law in the Tribunal's reasoning. Its finding that Mr. Jemiola was not a tenant and that no tenancy agreement was created are findings of fact or mixed fact and law, from which no appeal lies.

15 The parties may file brief written submissions on costs to the Registrar of the Divisional Court within 30 days.

Appeal dismissed.