2003 CarswellOnt 3674
Ontario Superior Court of Justice (Divisional Court)

Nesha v. Bezrukova

2003 CarswellOnt 3674, [2003] O.J. No. 3787

SAVANNAH NESHA (Tenant / Appellant) and SVITLANA BEZRUKOVA AND ELENA SIZRANOV (Landlords / Respondents)

Coo J., Cunningham A.C.J., and Dunnet J.

Heard: September 9, 2003
Judgment: September 9, 2003
Docket: 516/02

Proceedings: reversing *Nesha v. Bezrukova* (2002), 2002 CarswellOnt 5727 (Ont. Rental Housing Trib.)

Counsel: M. Kate Stephenson for Clinic Resource Office Legal Aid Ontario
Mary Ellen McIntyre for Downsview Community Legal Services
No one for Respondents

Subject: Property
Headnote
Landlord and tenant --- Residential tenancies — Constitutional issues — Jurisdiction of boards and commissions
Residential tenant applied for order that landlords interfered with her reasonable enjoyment of rental unit — Application was resolved in tenant's favour by order of Ontario Rental Housing Tribunal dated April 23, 2001 — Tribunal ruled that it did not have jurisdiction to award tenant compensation under Tenant Protection Act, 1997 — On July 16, 2001, Act was amended to provide tribunal with specific jurisdiction to award compensation — Tenant applied for review of original application in light of amendment to Act — Application was dismissed — Matter was res judicata — Retroactive legislation did not apply to decided case — Tenant appealed — Appeal allowed — Ruling founded on res judicata was made in error — Matter was remitted to tribunal for redetermination.

APPEAL by tenant of decision reported at 2002 CarswellOnt 5727 (Ont. Rental Housing Trib.) dismissing application for compensatory damages.

Per Curiam:

1 This is an appeal under s.196 of the *Tenant Protection Act* from a decision of the Ontario Rental Housing Tribunal that the appellant's claim against the landlord/respondents for damages was res judicata.

2 The Tribunal has sought to play no part in this appeal. The landlords do not appear and we have only the unopposed submissions of counsel for the appellant.

3 This is a matter with a complicated history. There were proceedings before the Ontario Rental Housing Tribunal between the landlords and the tenant, as a result of which the tenant was ordered to leave the premises on the basis that one of the landlords in good faith required them for personal use. The order was postponed for a considerable length of time to give the tenant, and I gather her son, full opportunity to find new quarters.

4 With respect to the tenant's claim against the landlords for abatement of rent by reason of fundamental breach of the landlord's obligations with respect to repair, the provision of heat and deprivation of storage space, a significant monetary order was made. The tenant also claimed damages from the landlords for breach of obligation in regard to stored possessions that

have now gone missing. The Tribunal member decided that he had no jurisdiction to award such damages under the wording of s.35(2) as it then read, which did not include the language now found in s.35(1)(a.1), despite the general language in s.35(1)(e). It should be noted that this interpretation was one of two that was at the time being applied by different Tribunal members to the section and that this Court later decided that there was jurisdiction under the section as it then existed to award damages to a tenant under the existing legislative provisions before the clarifying amendment already referred to.

5 The Tribunal member went on to say that he could not even award damages under s.35(2) on the basis of landlord misconduct under s.31(1)(8)(10) since the tenant left the premises pursuant to a Tribunal order and not the notice by the landlords. There was no such claim asserted by the tenant at that time. The tenant commenced a fresh application before the Tribunal after the amendment referred to, relying on the same contentions and now specifically relying on the misconduct of the landlord with respect to personal use to which the Tribunal had referred, albeit obiter, in the original decision on the general point.

6 The Tribunal, in an original decision confirmed on re-argument, determined that res judicata applied and there was no foundation for the argument that the amendment was not improperly sought to be interpreted retroactively. Those are the only two inter-related issues that are the subject of this appeal. They are matters of law, so no jurisdictional argument has any relevance here on the basis of s.196(1).

7 On the basis of the uncontested submissions received, the ruling made below founded on res judicata was made in error so far as the applicable law is concerned. Even were that not so, it is our view that the rigorous application of the doctrine would be very unfair given the complex and unsatisfactory state of the issues of jurisdiction in regard to damages at the material time. The right course here is to return the matter to the Tribunal with direction that it hear the application and the claim for damages on the merits, dealing with jurisdiction on the basis of the statutory provisions as they now stand.

8 In our view, given the issues involved and the uncertainty in the law, this is not a case for costs.

Appeal allowed.

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