

1985 CarswellOnt 1587
Ontario Divisional Court

Shaw v. Pajelle Investments Ltd.

1985 CarswellOnt 1587, [1985] O.J. No. 833, 11 O.A.C. 70, 31 A.C.W.S. (2d) 449

**In the Matter of Action No. M 85965/83 commenced
in the County Court of the Judicial District of York**

In the Matter of an appeal pursuant to s. 116 of the Landlord and Tenant Act, R.S.O. 1980, c. 232.

Shaw and Bourgeois v. Pajelle Investments Limited

Montgomery, J.

Heard: June 7, 1985

Judgment: June 21, 1985

Docket: 80/84

Counsel: *Diana M. Hunt*, for the tenants

David C. Bird, for the landlord

Subject: Property

Headnote

Landlord and Tenant --- Residential tenancies — Repairs and fitness — Landlord's obligation — Remedies — Damages
Punitive damages — Landlord and Tenant Act, R.S.O. 1980, c. 232, s. 96(3)(c).

Intolerable conditions driving tenants from leased premises -- Before tenants vacating, landlord bringing application for termination of tenancy, arrears of rent and possession -- Tenants filing cross-application for abatement of rent -- Judge allowing cross-application and awarding exemplary damages to tenants because of landlord's failure to keep premises in good state of repair -- Landlord appealing -- Appeal dismissed -- Judge having power to award exemplary damages in landlord and tenant proceedings.

Landlord and Tenant --- Residential tenancies — Rent — Obligation to pay

Abatement of rent — Landlord and Tenant Act, R.S.O. 1980, c. 232, s. 113, 113(a).

Intolerable conditions driving tenants from leased premises -- Before tenants vacating, landlord bringing application for termination of tenancy, arrears of rent and possession -- Tenants filing cross-application for abatement of rent -- Judge allowing cross-application -- Landlord appealing -- Appeal dismissed -- Although s. 113(2) of Act stating that only tenant in possession may apply for abatement of rent, in present case tenants complying with s. 113(2) -- Cross-application made after tenants vacating but landlord making application while tenants still in possession.

Montgomery, J.:

1 This is an appeal from Judge D. Haley ordering a landlord to pay an abatement of rent, special damages and exemplary damages in a residential tenancy.

2 Two issues arise for determination:

(1) Were the tenants out of possession at the time of the application such as to disqualify them from the relief granted because of the provisions of s. 113 of the **Landlord and Tenant Act**? (2) Can general damages be given by a judge hearing a landlord and tenant motion?

3 Sections 113 and 96 of the *Landlord and Tenant Act*, R.S.O. 1980, c. 232 state:

113.-(1) A landlord or a tenant may apply by summary application to a judge of the county or district court of the county or district in which the premises are situate for an order,

(c) for the payment of arrears of rent;

(f) for an abatement of rent;

(2) Application for an order under clause (1)(c), (d), (f) or (g) may be made only where the tenant is in possession, whether in accordance with the tenancy agreement or as an over-holding tenant.

96.-(1) A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety standards, including any housing standards required by law, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.

(2) The tenant is responsible for ordinary cleanliness of the rented premises and for the repair of damage caused by his wilful or negligent conduct or that of persons who are permitted on the premises by him.

(3) The obligations imposed under this section may be enforced by summary application to a judge of the county or district court of the county or district in which the premises are situate and the judge may,

(a) terminate the tenancy subject to such relief against forfeiture as the judge sees fit; (b) authorize any repair that has been or is to be made and order the cost thereof to be paid by the person responsible to make the repair, such cost to be recovered by due process or by set-off; (c) make such further or other order as the judge considers appropriate.

(4) This section applies to tenancies under tenancy agreements entered into or renewed on or after the 1st day of January, 1970 and to periodic tenancies on the first anniversary date of such tenancies on or after the 1st day of January, 1970 and in all other cases the law applies as it existed immediately before the 1st day of January, 1970.

4 Judge Haley found in graphic terms that the conditions were so intolerable for the tenants that they were driven from the premises. Several days before the tenants vacated, the landlord brought proceedings for termination of the tenancy, arrears of rent, and possession. The tenants filed a cross application for abatement of rent under s. 113. Damages and abatement of rent were sought under s. 96.

5 Section 113(2) states that an application for abatement may only be made where the tenant is in possession. I agree with Judge Haley that there was compliance with s. 113(2). The proceedings were one notwithstanding that the cross application was made after the tenants vacated. I see no sense in putting the tenants to the expense of proceeding in Small Claims Court. They were quite entitled to their remedy in this proceeding.

6 I dismiss the second argument of the appellant landlord on the same basis. The authority rests upon the judge in landlord and tenant proceedings to award damages in a proper case. Strong reliance was placed upon the decision of this court in *Re Hahn et al. and Kramer*, 23 O.R.(2d) 689. That case related to a commercial, not a residential, tenancy.

7 The decision of Judge Cornish in *Beyer et al. v. Absamco Developments Ltd. et al.*, 12 O.R.(2d) 768, rejecting the right to claim exemplary damages in a landlord and tenant action is, in my view, wrong. The learned judge had broad powers under s. 96(3)(c) of the *Act* to grant exemplary damages.

8 It makes little sense to compel a tenant to engage in a second proceeding before a Small Claims Court to get relief. The appeal is, therefore, dismissed with costs.

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