2001 CarswellOnt 2349
Ontario Superior Court of Justice (Divisional Court)

Mackay v. Sanghera

2001 CarswellOnt 2349, [2001] O.J. No. 2600, 106 A.C.W.S. (3d) 534

Re: Elizabeth Mackay, Appellant and Balbir Sanghera, Respondent

Chapnik J., Lane J., Then J.

Heard: June 6, 2001
Judgment: June 20, 2001
Docket: Brampton V1248/99

Counsel: *Colleen Sym*, for Appellant
Prakash David, for Respondent

Subject: Property
Headnote
Landlord and tenant --- Residential tenancies — Repairs and fitness — Landlord's obligation — Remedies — Abatement
Landlord and tenant --- Residential tenancies — Repairs and fitness — Landlord's obligation — Remedies — Damages

APPEAL by tenant from decision of Rental Housing Tribunal dismissing in part claim for abatement of rent and damages for landlord's breach of duty to repair.

Per Curiam:

1 This is an appeal from the August 26, 1999 decision of the Ontario Rental Housing Tribunal, granting the appellant an abatement of rent for the period March 5, 1998 to April 21, 1998, due to mould and mould removal in the leased premises, but dismissing the appellant's request for a rent abatement for the period January 1, 1998 to March 5, 1998 and her claim for compensation for damages to personal property.

2 The appellant submits the Tribunal erred in determining that a lack of notice by the tenant relieved the landlord from liability under s. 24 of the *Tenant Protection Act*.

3 We have carefully reviewed the Tribunal's Reasons for Decision, and we agree with the respondent that the interpretation given to the decision by the appellant is misconceived. The Tribunal did not determine that the lack of notice meant there was no breach of s. 24. On the contrary, in accordance with the landlord's responsibility to repair as set out in s. 24(1) and (2) of the Act, the Tribunal found a breach of s. 24 by the landlord. It stated:

> Clearly, as 1a result of the March 5, 1998 order of the health department, regardless of the landlord's actions, the unit is uninhabitable and therefore the tenant should be able to claim a rebate or abatement of the rent for the time period they are forced out of the unit.

4 The adjudicator found that, between taking possession and March 5 th , the tenant "never reported her claims to the landlord nor did she ask for him to do any repairs or maintenance". He went on to say:

> In my view, the lack of notice or complaint to the landlord relieves him from any liability. I accept his evidence that the premises were fit for habitation on the day of occupancy and absent any evidence to the contrary, he would have no reason to inspect or repair the premises until an action of the tenant caused him to.

> The evidence before me clearly indicates that the tenant at no time ever complained verbally or in writing to the landlord. The landlord knew nothing of any problems at all until he received a notice from the Health Department of the Region of Halton. There was a great deal of evidence provided as to the state of the unit on particular days but I am of the view that it is all superfluous window dressing as the landlord cannot act until he is aware of the problem. Then, in my view, this tribunal must determine if he acted reasonably in trying to remedy the situation, or whether he failed to repair or maintain the unit.

5 When these findings are viewed in the context of the Reasons in their totality, it becomes clear that when the Tribunal referred to the relief of liability, it was considering the remedy requested by the tenant for the period before March 5, 1998. Any implications arising from the lack of notice or complaint were rooted in the issue of the tenant's claim for damages.

6 Section 34(2) of the Act addresses remedies that may be granted to a tenant in the event of a breach of s. 24 by the landlord. One of the considerations in doing so is the notice given by the tenant to the landlord.

> 34(2) In determining the remedy under this section, the Tribunal shall consider whether the tenant or former tenant advised the landlord of the alleged breaches before applying to the Tribunal.

Accordingly, notice or a lack of notice is a relevant factor for determining the remedy for a breach of s. 24.

7 Interestingly, the Review Order issued on August 26, 1999 interprets the Tribunal's decision in like manner. The Review Officer viewed the Tribunal's findings of lack of notice as being referable to the determination of remedies under s. 34(1), in particular, to the tenant's claim for damages in respect of her personal belongings and out of pocket expenses.

8 In declining to award costs or damages to the tenant under s. 34(1)5 which permits it to "make any other order that it considers appropriate" the Tribunal relied upon the exclusionary clause in the lease agreement. In an appropriate case, there may be a basis for an award of damages to tenants for consequential damage arising from a landlord's breach of obligations under s. 24(1), within the monetary limits imposed by s. 193(1) of the Act, even in the face of an exclusionary clause in the contract favouring the landlord. Nevertheless, in the circumstances of this case, the Tribunal was correct in reaching the conclusion it did.

9 The decision of the Tribunal to order an abatement of rent for a period of time, but not to award of damages such as out of pocket expenses to the tenant, pursuant to s. 34, is discretionary. Given the conclusions of fact and credibility made by the Tribunal, including the important findings that the premises were clean and in good repair when the tenant entered into possession and that the tenant never gave notice to the landlord of any maintenance issues, the dismissal of the claims for additional relief was, in our view, reasonable and supported by the evidence.

10 The Tribunal also found that the landlord could not have reasonably known of any problem. In *McQuestion v. Schneider* (1975), 8 O.R. (2d) 249 (Ont. C.A.), the court rejected the argument that the landlord's duty to repair and maintain the premises imposes strict liability on a landlord, and found that liability for injuries or damages could not be imposed on a landlord who had no knowledge or could not reasonably be expected to have knowledge of a maintenance defect.

11 We see no error of law in the Tribunal's decision. The decision is, we find, the correct one, based on the findings of fact and the evidence. The appeal is, therefore, dismissed with costs to the respondent fixed, as agreed, in the amount of $1,100.00. The cross-appeal is dismissed without costs.

Appeal dismissed.

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