

Schell v. Clarke, 2020 ONSC 7169 (CanLII)

Date: 2020-11-26
File number: 34/18
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CITATION: Schell v. Clarke, 2020 ONSC 7169
DIVISIONAL COURT FILE NO.: 34/18
DATE: 20201126

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BACKHOUSE, NEWTON, KRISTJANSON JJ.

BETWEEN:)
)
TAMARA-ASHLEY SCHELL)
) *Lucas Gindin, for the Tenant/Appellant*
Tenant/Appellant))
- **and** -))
))
MICHAEL CLARKE) *Philip Cornish, Counsel for Landlord/Respondent*
Landlord/Respondent)
)
)
) **HEARD by Video Conference** November 23, 2020

BACKHOUSE J.

[1] The tenant, Ms. Schell, appeals from a decision of the Landlord and Tenant Board (“LTB”) dated March 19, 2018 dismissing her claim for reimbursement of monies allegedly paid pursuant to an illegal rent increase.

[2] An appeal lies to this court only on a question of law (see *Residential Tenancies Act, 2006, S.O. 2006, C. 17, s. 21* (“RTA”)).

[3] Since the Supreme Court of Canada’s decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 37, statutory appeals are subject to the

appellate standard of review established in *Housen v. Nikolaisen*, 2002 SCC 33. The standard of review on a question of law is correctness.

[4] The following facts are uncontested. The tenant rented a house in Wingham, Ontario from the landlord from May 1, 2015 to April 21, 2017, when the tenant vacated the house. The tenancy agreement was originally a month-to-month oral agreement, with the tenant agreeing to pay \$650 per month. In February 2016, the landlord informed the tenant that he was planning to sell the house, thereby ending the tenant's tenancy. In February 2016, the tenant made the landlord an offer to pay more to remain in the house. The parties negotiated a rental increase of \$200 per month, changing the rental price from \$650 per month to \$850 per month. A written lease recording the \$850 per month rental price was signed in February 2016. The landlord did not serve a notice of rent increase on the tenant.

[5] The LTB found that notwithstanding that the landlord did not give notice of the rent increase, on these facts there was an express agreement to the increase between the landlord and tenant which was therefore not an illegal charge. The LTB found that the parties negotiated a new tenancy agreement and dismissed the tenant's claim of an illegal rent increase. *Price v. Turnbull's Grove Inc.*, 2007 ONCA 408 was relied upon as authority for the proposition that where there was an express agreement, this was not an illegal charge.

[6] Subsequent to the LTB's Decision, the Court of Appeal for Ontario released its decision in *Honsberger et al. v. Grant Lake Forest Resources Ltd.*, [2019] ONCA 44, which clarified that upon the expiry of an existing lease, where the parties and premises that are the subject of a tenancy agreement do not change, a new tenancy agreement cannot be created outside of the rental increase constraints of s.120 of the RTA.

[7] The landlord asserts that it comes within the exceptions set out in *Honsberger*. He submits that the written agreement changed the oral agreement by (a) allowing the tenant's spouse to be an occupant of the house and (b) allowing the tenant to rent the garage, which were not parts of the oral agreement.

[8] Paragraph 2 of the Decision states that the tenant and her children were the only occupants during the tenancy. If this was meant to refer to both the oral tenancy and the written tenancy, this was not correct because the written agreement refers to the tenant's spouse as an occupant. The written agreement refers to the rental premises as 86 Mary Street, Wingham, Ontario and gives the tenant the use of the "full driveway and garage". The rent of \$850/month is attributed to the rental premises. No amount is attributed to parking or additional services.

[9] The tenant points out that the LTB is directed to ascertain the real substance of the transaction pursuant to s. 202 of the RSA. The LTB found that the tenant agreed to a new rental amount of \$850/month largely to deter the landlord from his plan to sell the rental unit. The tenant submits that the real substance of this transaction was to preserve the tenancy, not to end it. The tenant argues that the fact that her spouse was not named as a tenant and that no monetary value was attached to the use of the garage underscores that the real substance of the transaction was that the written agreement was entered into to deter the landlord from his plan to sell the rental unit and not to create a new tenancy. She submits that the LTB erred in law when it found that this ended the tenancy.

[10] I agree that it was a misapplication of the decision in *Price* for the LTB to rely upon it to support its finding that the increase in rent was not an illegal charge because there was an express agreement. The decision to dismiss the tenant's claim of an illegal rent increase cannot be sustained on this basis. However, that does not end the matter.

[11] The hearing in this case was held prior to the release of *Honsberger*. Counsel who appeared in this court were not counsel before the LTB. The matter does not appear to have

been argued before the LTB on the basis of whether or not the parties or premises changed under the written agreement.

[12] There is no finding in the Decision regarding a change to the leased premises. The written lease naming the tenant's spouse as an occupant and designating the garage as part of the leased premises does not answer whether this was a change to the parties or premises from under the oral lease. I am unable to agree with the landlord that the reference in Paragraph 59 of the Decision to the tenant's spouse denying a contractor entry into the unit is sufficient to infer that there was a change to the parties under the written agreement.

[13] Unfortunately no transcript of the hearing exists which might assist the court in determining whether or not there was evidence to find that the exceptions in *Honsberger* applied. In these circumstances, I have concluded that the correct result is to refer this matter back to be heard by the LTB to determine whether the parties and premises that are the subject of the written tenancy agreement changed from under the oral lease sufficient to meet the exceptions set out in *Honsberger*. It shall also determine the amount owing if this was an illegal rent increase and whether the limitation period under s.135.1(2) of the *RTA* applies.

[14] I have endorsed the Appeal Book: " This appeal is allowed and referred back to a new Member of the LTB to determine the issues set out in paragraph 13 of the Reasons."

[15] Given the clarification in the law that occurred in *Honsberger* after the LTB's Decision in this matter, there shall be no order as to costs.

Backhouse J.

I agree

Newton J.

I agree

Kristjanson J.

Released: November 26, 2020

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TAMARA-ASHLEY SCHELL

Tenant/Appellant

– and –

MICHAEL CLARKE

Landlord/Respondent

REASONS FOR JUDGMENT

Released: November 26, 2020

Backhouse, J.