CITATION: Smith v. Gega, 2023 ONSC 4723
COURT FILE NO.: DC-23-001-00
DATE: 2023 08 16

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:	)	
	)	
SUSAN SMITH	)	
	)	*Christopher Melville-Gray,* for the Appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	
	)	
FATIMIR GEGA and LULE GEGA	)	*Timothy Duggan*, for the Respondents
	)	
	)	
Respondents	)	
	)	
	))	**HEARD:** June 23, 2023, by Video Conference

RULING ON APPLICATION

[1] The Tenant (Appellant), Susan Smith ("Smith") appeals a decision of the Landlord and Tenant Board dated December 12, 2022, which found that Smith did not meet the definition of "tenant" under section 2(1) of the *Residential Tenancies Act*, 2006 S.O. 2006, c.17 ("*RTA*"), resulting in Smith

receiving an Eviction Order dated December 12, 2022 to move out of her rental condominium by January 4, 2023.

[2] For the reasons that follow, I find that Smith was not a tenant as defined in 2(1) of the *RTA*, and that she therefore is unable to access the protection provided to tenants in section 51(1) of the *RTA* at the time that the Condominium Declaration was prepared on January 27, 2011. The December 12, 2022 Eviction Order is therefore valid, and Smith's appeal is dismissed.

BACKGROUND

[3] The facts in this case are not in dispute. Smith is a 59 year old woman who has been residing at 3360 The Credit Woodlands, Unit 18, Mississauga, Ontario since 1964. Smith grew up at this property, where she lived continuously with her parents until their passing. After her parents died (her father in 2015 and her mother in 2018), Smith continued to reside as a tenant at the property, but no new lease was ever signed. There is no issue that Smith was considered to be a tenant of the property at the time that she was served with the Eviction Notice in December of 2022.

[4] Between 1964 and 1978, various fixed term leases were entered into between the landlord and Smith's parents. The last time a lease was signed with respect to the property was in 1978, with an expiry date of July 31, 1979. In that lease, Smith's parents are listed as the "tenants" and Smith is listed as an "occupant".

[5] Following the expiry of the 1978 Lease Agreement, the tenants continued to rent the premises on a month to month basis.

[6] Since the late 1980s, Smith contributed towards paying the rent along with her parents, and she also assisted with the general upkeep of the property, and maintenance requests made by the former landlord. Smith has never defaulted with a rental payment.

[7] On January 27, 2011, the property was converted into a condominium by way of a Condominium Declaration. Smith continued to reside at the property before and after the condominium conversion took place.

[8] This ongoing tenancy remained in place until new owners (the Respondents, Fatmir Gega and Lule Gega "the Landlords") purchased the condominium unit on October 1, 2021, and subsequently served Smith with an Eviction Notice on October 29, 2021 pursuant to section 48 of the *RTA*, as they intended to move into the unit themselves for at least one year.

[9] The Landlords then filed an application with the Board to terminate Smith's tenancy pursuant to the Eviction Notice. The Eviction Application was heard by the Landlord and Tenant Board on June 2, 2022.

[10] At the hearing, Smith did not raise concerns about the validity of the Eviction Notice. Her main argument was that she was already a tenant at the time that the property was converted to a condominium by living with her parents before the condominium conversion, paying rent, and assisting with upkeep required by the Landlord. She further argues that the definition of "tenant" under section 2(1) of the *RTA* includes "the tenant's heirs". She submits that she was an heir to her parents at the time that the Condominium Declaration was prepared, and therefore she cannot be evicted now pursuant to Section 51(1) of the *RTA*.

[11] On December 12, 2022, the Landlord and Tenant Board released its decision, finding that at the time that the condominium conversion took place in 2011, Smith was not a tenant, and therefore is not able to access the protection offered to tenants under section 51(1) of the *RTA*. The Board therefore upheld the Eviction Notice, and ordered that Smith vacate the premises by January 4, 2023 ("the Order").

[12] Smith appeals the Order, and such appeal stayed the Eviction Order pursuant to section 25(1) of the *Statutory Powers Procedure Act*.

JURISDICTION

[13] The Divisional Court has jurisdiction pursuant to s.210 of the *RTA*, to hear appeals on questions of law. As of January 25, 2023, as per the memorandum from Associate Chief Justice McWatt, issued pursuant to section 21(2)(c) of the *Courts of Justice Act*, all appeals from the Landlord and Tenant Board are to be decided by a single judge of the Divisional Court. I therefore have appropriate jurisdiction to hear this matter.

[14] Under subs. 210 (4) and (5) of the *RTA*, I may affirm, rescind, or replace the Order; remit the matter to the Board with the Divisional Court's opinion; or make any other order, including with respect to costs that I consider proper.

STANDARD OF REVIEW

[15] This matter is proceeding by way of appeal on a question of law, which requires me to apply a correctness standard, pursuant to the Supreme Court decision in *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), at para.8.

ISSUES RAISED BY THE APPLICANT

[16] Did the Board err in its interpretation of "tenant" as defined under section 2(1) of the *RTA* in two different aspects?

i) Was Smith a tenant at the time that the Condominium Declaration was prepared by living with her parents and helping to pay rent and assisting with repairs? and

ii) Was Smith a tenant at the time that the Condominium Declaration was prepared by virtue of being an "heir" of her parents?

IS THE APPEAL A QUESTION OF LAW?

[17] The appeal addresses two issues. The first issue is whether Smith was a tenant in her own right at the time of the Condominium Declaration by living with her parents, paying rent, and assisting with repairs. This issue is a question of mixed fact and law. After considering the evidence, the Board made a finding that Smith was not a tenant at the time that the Condominium Declaration was prepared. This aspect of the appeal is therefore dismissed, as appeals are limited to questions of law only pursuant to section 210 of the *RTA*.

[18] The second issue involves an interpretation of s.51(1) of the *RTA*, and in particular, the meaning of "tenant" in that section when considered in the context of s.2(1). Section 2(1) defines tenant to include "heirs, assigns and personal representatives" of the tenant.

[19] This issue is a matter of law. The Landlords argue that this issue is a matter of mixed fact and law, but there are no factual findings that need to be made by me to consider this question.

RELEVANT STATUTES

[20] Section 2(1) of the *RTA* states:

> Interpretation
>
> 2 (1) In this *Act*, "tenant" includes 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; ("locataire") (emphasis added).

[21] Section 51(1) of the *RTA* states:

> 51 (1) If a part or all of a residential complex becomes subject to a registered declaration and description under the *Condominium Act,* 1998 or a predecessor of that *Act* on or after June 17, 1998, a landlord may not give a notice under section 48 or 49 to a person *who was a tenant* of a rental unit when it became subject to the registered declaration and description. 2006, c. 17, s. 51 (1) (emphasis added).

Position of the Tenant Smith

[21] It is an undisputed fact that Smith lived in the apartment with her parents years before the Condominium Declaration was prepared. Smith takes the position that as a child of her parents living with her parents in the apartment at the time that the Condominium Declaration was prepared, she is an "heir" of her parents, notwithstanding that they were alive on the date that the building was converted into a condominium, and therefore qualifies as a tenant as defined under section 2(1) of the *RTA*.

[22] Smith states that the Board erred in its interpretation of the word "tenant" in section 2(1) of the *RTA*, and that therefore she remains protected and cannot now be evicted under section 51(1) of the *Act*.

[23] Smith also argues that if there is any uncertainty as to the intent of the legislature in utilizing the word "heirs" in section 2(1) of the *RTA*, I ought to favour an interpretation that has a tenant

protection focus, recognizing the guidance received from the Court of Appeal in *Honsberger v. Grant Lake Forest Resources Ltd.* 2019 ONCA 44, para.19:

> This court has described the *RTA* as remedial legislation having a "tenant protection focus": *Metropolitan Toronto Housing Authority v. Godwin*, 2002 CanLII 41961 (ON CA), 161 O.A.C. 57 at para 19. As remedial legislation, the *Act* must receive "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the *Act* according to its true intent, meaning and spirit".

Position of the Landlords

[24] The Landlords state that Smith was not a tenant at the time that the Condominium Declaration was prepared in 2011, and that she therefore cannot be protected under section 51(1) of the *RTA*. They argue that Smith was essentially an unauthorized assignee of the unit after her mother died in 2018, but when the previous Landlord did not move to evict her after 60 days, a new month to month tenancy was created. The Landlords further submit that the legislature included the words “the tenant’s heirs” in section 2(1) of the *Act* to address situations where a tenant has died, and their heirs need to pursue proceedings against the landlord where warranted.

[25] In making this decision, I recognize and respect the specialized function of tribunals such as the Landlord and Tenant Board, as described by this court in *Planet Energy (Ontario) Corp. v. Ontario Energy Board*, 2020 ONSC 598 (CanLII) at paragraph 31:

> While the Court will ultimately review the interpretation of the *Act* on a standard of correctness, respect for the specialized function of the Board still remains important. One of the important messages in *Vavilov* is the need for the courts to respect the institutional design chosen by the Legislature when it has established an administrative tribunal (at para. 36). In the present case, the Court would be greatly assisted with its interpretive task if it had the assistance of the Board’s interpretation respecting the words of the *Act*, the general scheme of the *Act* and the policy objectives behind the provision.

Analysis

Can a living tenant have “heirs” as defined in section 2(1) of the *RTA*?

[26] In its decision, the Landlord and Tenant Board found that Smith’s interpretation of section 2(1) "would essentially convert a tenancy into a property right that can be passed between heirs”. The Board then concluded that it did not believe the legislature would have intended this result, and instead, suggests that the legislature intended the use of the word “heirs” to incorporate scenarios

where action needs to be taken on behalf of an estate, such as for the purpose of removing property from the unit.

[27] In this regard, the Board's reasoning is similar to a previous decision from the Landlord and Tenant Board in *1500 Tansley C/O Lakeshore Management v. Smith*, 2002 CarswellOnt 3788 (Ont. R.H.T.), in which Member Tinker stated at para. 6:

> With respect to an heir being included in the definition of tenant, there is no evidence that an heir simply steps into the shoes of the tenant with respect to the occupancy of a rental unit. I find that "heir" was included in the definition of tenant, in order for an estate to recover the deposit or interest on such a deposit, etc. Furthermore, no argument was presented as to whether a month to month tenancy can be considered real or personal property, i.e., something to inherit.

[28] The legislation provides little assistance in determining which interpretation of the words "tenant's heirs" was intended by the drafters of the legislation, nor is the purpose of including these words specified in the legislation. There is certainly no provision or direction that the term "tenant's heirs" was included *only* for the purposes of litigation on behalf of the estate of a deceased tenant, as is being argued by the Landlords.

[29] Neither party was able to direct me to a case interpreting the language of "the tenant's heirs" in section 2(1) of the *RTA* that involved a similar fact pattern to the present case, where the child of the parents was living with the parents in the apartment at the time the Condominium Declaration was delivered. It is therefore of assistance to review the treatment of the word "tenant" in other locations in the *Act.*

[30] In particular, it is noteworthy that the *Act* does specifically contemplate the rights of a tenant's spouse upon their death. Subsection 3 (1) of the *RTA* states the following:

> In particular, it is noteworthy that the *Act* does specifically contemplate the rights of a tenant's spouse upon their death. Subsection 3 (1) of the *RTA* states the following: 3(1) If a tenant of a rental unit dies and the rental unit is the principal residence of the spouse of that tenant, *the spouse is included in the definition of "tenant"* in subsection 2 (1) of the *Act* unless the spouse vacates the unit within the 30-day period described in subsection 91 (1) of the *Act*. (emphasis added)

[31] The legislature has therefore taken very specific steps to ensure that a spouse of a tenant has the right to remain a tenant in the rental location after the main tenant has died. If the legislature had intended for children to also be included in the definition of tenant, section 3(1) would have been a natural place to include protections for children of tenants along with the spouse of a tenant. This was not done.

[32] Although I recognize the need to apply a fair, large and liberal construction and interpretation of the *Act*, I cannot ignore the true intent, meaning and spirit of the *Act*. Although the words "tenant's heirs" do appear under the definition of tenant in section 2(1) of the *Act*, interpreting the phrase "tenant's heirs" to include children living at the same time as the tenant does not fit with

section 3(1) of the *Act*. The fact that section 3(1) is silent about children being included in the definition of tenant suggests that the legislature did not intend for children to be considered tenants in section 2(1) notwithstanding the use of the phrase “tenant’s heirs” in the definition of “tenant”.

[33] It would have been helpful, and less confusing, if the legislature had precisely stated the reason for including “tenant’s heirs” in the definition of tenant under section 2(1). But since the section provides no further guidance with respect to interpreting these words, I must consider the overall framework of the *Act*. I can see no specific purpose for interpreting “tenant’s heirs” to include children of a living tenant, which is the interpretation of the section that Smith is encouraging me to adopt.

[34] Smith also argues that the use of the words "tenant's heirs" must be read in conjunction with the legislature's reference to "members of a household" used in section 22 of the *RTA*. The language of section 22 is as follows:

> Landlord not to interfere with reasonable enjoyment
>
> 22 A landlord shall not at any time during a tenant’s occupancy of a rental unit and before the day on which an order evicting the tenant is executed substantially interfere with the reasonable enjoyment of the rental unit or the residential complex in which it is located for all usual purposes by a tenant or members of his or her household. 2006, c. 17, s. 22.

[35] Smith argues that the legislature did not intend for remote or distant heirs who do not have a close connection with a subject property to be classified as a "tenant", but rather, intended the phrase “tenant’s heirs” to include members of a household who are living with the tenant, which is consistent with the language in section 22 of the *RTA*.

[36] Smith’s analysis pertaining to section 22 of the *RTA* requires the addition of the words “who are living with the tenant” to the words “tenant’s heirs” in section 2(1). The legislature could have added these words if the intention had been to allow children living with a tenant to be included in the definition of “tenant”. I must interpret the legislation by considering the plain, ordinary use of the words, and resist the temptation to add in qualifying words or language that was not included by the drafters of the legislation.

DOES SMITH’S INTERPRETATION OF “HEIRS” CREATE A PROPERTY RIGHT IN A RENTAL UNIT THAT CAN BE INHERITED?

[37] Smith argues that the Board was incorrect when it concluded that including “heirs” in the plain text definition of “tenant” would create a property right that can be passed between heirs. Smith states that a “property right” is defined in Black's Law Dictionary as "the rights given to the person or persons who have a right to own the property through purchase or bequest." This definition indicates that a property right coincides with the ownership of a property, or the bequest of ownership of a property through a will or inheritance. As Smith was, and continues to be, a person paying rent, there is no suggestion that she or her parents had ownership of the unit. There is no dispute about this fact.

[38] However, I read the Board’s decision to indicate that if heirs can be automatically considered as tenants under the lease, that would create a situation akin to property rights, which cannot exist

in a rental situation. This is an important point to consider, and weighs against the interpretation of "tenant's heirs" that is being suggested by Smith.

CONCLUSION

[39] Smith argues that she was a tenant of the apartment along with her parents at the time that the Condominium Declaration was prepared, and that as a result, she is protected under section 51(1) of the *RTA*, and should be permitted to remain a tenant of the condominium. This issue is a question of mixed fact and law, and is therefore not subject to appeal to this court.

[40] Smith also argues that the Board erred in law by not finding that she was a "tenant's heir", and thereby a "tenant" pursuant to section 2(1) of the *RTA* at the time that the Condominium Declaration was prepared, since she was living in the apartment with her parents at the relevant time. The Board rejected this interpretation by Smith, and agreed with the position of the Landlords that the phrase "tenant's heirs" was included in the statute to address residual estate issues following the death of a tenant.

[41] I find that the Board made no error of law in its interpretation of "tenant" in sections 2(1) and 51(1) of the *Act*. It is the interpretation that fits in best with the overall framework of the *RTA*, including the decision of the legislature to provide protection to the spouse of a deceased tenant in section 3(1) of the *RTA*, but not offer that same protection to the children of the deceased tenant.

[42] I therefore find that the Board did not err in finding that Smith was not a tenant at the time that the Condominium Declaration was prepared, and that she is accordingly unable to obtain the protection of section 51(1) of the *RTA*.

Disposition

[43] The appeal is dismissed, and the Order staying the Eviction Notice pursuant to Rule 63.01(3) of the *Rules of Civil Procedure* is vacated. The Sheriff shall forthwith enforce the Board's Eviction Order of December 12, 2022.

Costs

[44] If the parties are unable to agree upon costs, the Landlords are to prepare submissions no longer than 3 pages double spaced by August 30, 2023, not including any Bills of Costs or Offers to Settle. Smith's response is also to be limited to 3 pages double spaced, and is due 15 days after receipt of the Landlords' cost submissions. No reply submissions shall be filed unless requested by me. Costs submissions shall be sent to my judicial assistant Melanie Powers at melanie.powers@ontario.ca. If I have not received any submissions within the time frames set out above, I make no order as to costs.

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Wilkinson J.

Released: August 16, 2023

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B E T W E E N:

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Appellants

- and -

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Respondent

RULING OF APPLICATION

Wilkinson J.

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