2009 CarswellOnt 4125
Ontario Superior Court of Justice (Divisional Court)

Nistap Development Corp. v. McIntyre

2009 CarswellOnt 4125, [2009] O.J. No. 2960, 179 A.C.W.S. (3d) 442

NISTAP DEVELOPMENT CORPORATION (Appellant) and JOHN MCINTYRE and MARIA MOURYAS (Respondents)

Jennings J.

Heard: July 7, 2009
Judgment: July 7, 2009
Docket: Toronto 35/08

Proceedings: reversing *Nistap Development Corp v. McIntyre* (2007), 2007 CarswellOnt 9983 (Ont. S.C.J.)

Counsel: Yan David Payne for Appellant
No one for Respondents, John McIntyre

Subject: Property

Headnote

Real property --- Landlord and tenant — Residential tenancies — Rent — Obligation to pay — Miscellaneous

Parties entered into written lease for residential premises for monthly rent as found by trial judge of $1,030 which included one parking space — Lease terminated after one year and tenants remained in possession on month-to-month basis — Tenants moved out of premises in February 2004 — Corporate landlord brought claim alleging that January rent was short, and that tenants failed to give statutory 60 days notice — Trial judge dismissed claim, finding that there was oral agreement to terminate tenancy and that tenants were entitled to offset costs they incurred for work done on premises against any rent owing — Appeal by landlord allowed — Trial judge found that while no written notice of termination was given to landlord, there was oral agreement with its representative permitting tenants to terminate without proper notice in return for waiver of claim for costs that they incurred to do repairs on premises — That finding was impermissible and constituted error in law — Tenant Protection Act, 1997 requires written notice to terminate tenancy, and no other agreement can suffice — Tenants did not comply with requirement to give written notice — Accordingly, trial judge's finding of oral agreement containing notice was not open to him — Record was sufficient to grant judgment on landlord's claim in net amount of $6,095 — Trial judge accepted amount claimed, not hearing any defence evidence to contrary — Judgment of trial judge set aside and judgment for landlord granted in amount of $6,095.

Real property --- Landlord and tenant — Residential tenancies — Termination of tenancy — Practice and procedure — Notice — Miscellaneous

Parties entered into written lease for residential premises for monthly rent as found by trial judge of $1,030 which included one parking space — Lease terminated after one year and tenants remained in possession on month-to-month basis — Tenants moved out of premises in February 2004 — Corporate landlord brought claim alleging that January rent was short, and that tenants failed to give statutory 60 days notice — Trial judge dismissed claim, finding that there was oral agreement to terminate tenancy and that tenants were entitled to offset costs they incurred for work done on premises against any rent owing — Appeal by landlord allowed — Trial judge found that while no written notice of termination was given to landlord, there was oral agreement with its representative permitting tenants to terminate without proper notice in return for waiver of claim for costs that they incurred to do repairs on premises — That finding was impermissible and constituted error in law — Tenant Protection Act, 1997 requires written notice to terminate tenancy, and no other agreement can suffice — Tenants did not comply with requirement to give written notice — Accordingly, trial judge's finding of oral agreement containing notice was not open to him — Record was sufficient to grant judgment on landlord's claim in net amount of $6,095 — Trial judge accepted amount

claimed, not hearing any defence evidence to contrary — Judgment of trial judge set aside and judgment for landlord granted in amount of $6,095.

APPEAL by landlord from judgment reported at *Nistap Development Corp v. McIntyre* (2007), 2007 CarswellOnt 9983 (Ont. S.C.J.), holding that there was oral agreement to terminate tenancy and that tenants were entitled to offset costs they incurred for work done on premises against any rent owing.

***Jennings J.*:**

1 This is an appeal from the decision of Deputy Judge Libman dated December 14, 2007, holding that there was an oral agreement between the parties to terminate the tenancy at issue in this appeal and that the defendants were entitled to offset the costs they incurred for work done on the premises against any rent owing.

2 The appeal was called on for hearing at 9:00 a.m. this morning. Counsel for the appellant appeared, the respondents did not appear.

3 I am satisfied they were served properly with the materials to be used on the appeal including the Notice of Appeal, Factum, Compendium and Appeal Book, and that they were given notice by the this Court of the appeal's date.

4 I was not satisfied that effective notice had been given to them by the Court as to the starting time of 9:00 a.m. as opposed to 10:00 a.m., the Court officials having been unable to reach them by telephone at the number provided by the respondents to the Court. I accordingly held the matter down until 10:30 a.m. No one appeared for the respondents and they did not themselves appear. I proceeded to hear the appeal.

5 Briefly stated, the facts are that in February 2001 the parties entered into a written lease for residential premises at 1955 Victoria Park Avenue for a monthly rent as found by the trial judge of $1,030.00 which included the space for the parking of one car.

6 The parties apparently agreed that an extra parking space would be made available to the tenants for an increase in rent of some $45.00 per month but the trial judge found there was no written memorandum of that variation of the lease and declined to give effect to it.

7 The lease terminated at the end of a year and the tenants remained in possession on a month-to-month basis. Some time in February 2004 the tenants moved out of the premises. The evidence was that at that time there was some money owing for the January rent and of course nothing was paid thereafter.

8 The trial judge found that although no written notice of termination was given to the landlord, there was an oral agreement as alleged by the tenants permitting them to leave without proper notice in return for a waiver of a claim for costs that they incurred to do some repairs on the premises.

9 In my opinion, that finding was impermissible and constitutes an error in law.

10 The *Tenant Protection Act, 1997*, the legislation pertaining to this matter, is a complete code of the rights between the landlord and the tenant. Section 2(1) of the *Act* provides in part that the statute applies to rental units in a residential complex which was the case in the matter before me despite any other Act and despite any agreement or waiver to the contrary.

11 Section 43(1) of the statute provides that a notice to terminate a tenancy shall be in a form approved by the Tribunal. This Court has held in the case of *George V. Apartments Ltd. v. Cobb*, [2002] O.J. No. 5918 (Ont. Div. Ct.), that written notice is mandated by the statute and no other notice can suffice.

12 There is no dispute that the tenants did not comply with the requirement to give written notice. The finding of the trial judge of an oral agreement containing notice was not open to him and on that ground the appeal must be allowed.

13 The record is sufficient in my opinion for me to give judgment now without referring the matter back and putting the parties to the expense of a new hearing.

14 The claim presented to the Court was in the net amount of $6,095.00 after deducting from it a claim for repairs to the premises in the sum of $250.00 which was not pursued at trial.

15 The trial judge accepted the amount of the claim saying at page 27 of the transcript that he had not heard any defence disagreeing with the amount that was being claimed. That being so, it is open to me on this appeal to grant judgment to the appellant Nistap in the sum of $6,095.00.

16 Accordingly, the judgment of the trial judge is set aside and in place of it will go, judgment for the plaintiff in the sum that I have mentioned of $6,095.00. Counsel has stressed the importance of this decision to the industry and I accept that his concerns are legitimate. Nevertheless, his claim for costs in the sum of $5,000.00 is, under the circumstances and the amount involved, in my opinion, excessive. I fix costs at $3,750.00, inclusive to be payable by the respondents to the appellant forthwith.

Appeal allowed.

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