

1990 CarswellOnt 516  
Ontario District Court

Seberras v. Shende

1990 CarswellOnt 516, [1990] O.J. No. 3155, 10 R.P.R. (2d) 52, 20 A.C.W.S. (3d) 268

**SEBERRAS v. SHENDE et al.**

Gibson D.C.J.

Heard: February 26, 1990  
Docket: Doc. No. York 382906/90

Counsel: *Mark Wainberg*, for tenants.

*Stuart Cruikshank*, for occupants.

*Timothy M. Kinnaird*, for landlords.

Subject: Property

**Headnote**

Landlord and Tenant --- Residential tenancies — Relationship of landlord and tenant

Residential tenancies — Sublease — Surrender — Tenant having subleased premises without landlord's consent — Mere knowledge of subtenancy on part of landlord not constituting acquiescence — Subtenants being trespassers and required to vacate on reasonable notice.

The plaintiffs had leased their house, which contained two self-contained apartments, to L under a 3-year lease. The plaintiffs subsequently decided to sell the residence and required vacant possession to be able to do so. Although L had agreed to vacate the premises, the basement apartment had previously been sublet to the defendants under a verbal arrangement. Although the plaintiffs had been aware of the defendants' occupation of the premises, their consent to the purported subtenancy had not been sought by L nor given by them. The defendants refused to vacate the premises, and the plaintiffs commenced an action for a declaration that the purported subtenancy was null and void and that the defendants were trespassing on the premises. The plaintiffs brought a motion for summary judgment in their action.

**Held:**

The motion was granted.

The plaintiffs had not consented to the purported subtenancy, and mere knowledge on their part of the defendants' occupation of the premises did not constitute acquiescence giving rise to the relationship of landlord and tenant between them and the defendants. Therefore, as there was no actual consent or deemed acquiescence, the defendants were trespassers and were required to vacate the premises on reasonable notice.

MOTION for summary judgment.

**Gibson D.C.J.:**

1 This motion for judgment raises an interesting issue, and one that appears to occur frequently in Toronto these days.

2 I feel a brief recital of the facts is necessary. The plaintiff owns a house (containing two self-contained apartments) and for financial reasons rented it to the defendants James Lindenias and Deborah Lindenias under a 2-year lease, which lease was extended to a third year, to expire the end of February 1990.

3 In mid-1989, the plaintiff's financial circumstances improved, and [it was] discussed, in the summer, James Lindenias and Deborah Lindenias vacating in the fall, as the plaintiff wanted to buy a larger house and was desirous of selling this house first and needed vacant possession to be able to do so. James Lindenias and Deborah Lindenias agreed in September they'd do so.

4 In May 1989, James Lindenias and Deborah Lindenias had sublet the basement to the other defendants under a verbal arrangement. There is no evidence as to the length of this sublet. The evidence indicates that, by the end of June, the plaintiff was aware that these defendants were occupying the basement apartment; but the plaintiff took no steps to get them out of the house, nor did anyone seek the plaintiff's approval to this sublet either before or after the occupants moved in.

5 The plaintiff ultimately purchased a new house, closing the transaction in December. James Lindenias and Deborah Lindenias had moved out at the end of October, and although they requested the basement occupants to leave at the same time the occupants refused to do so and, before me, take the position that they are entitled to remain as long as (they) wish, and are tenants.

6 The evidence is that the cost of maintaining two houses is most onerous (since purchasers are reluctant to purchase a house with tenants in it), and the strain is jeopardizing the health of (the plaintiff) and his wife.

7 The plaintiff has brought this action for a declaration that the purported subtenancy is null and void and that the defendants Kim Shende and Stacey Harrison are trespassers and are to deliver up vacant possession of the premises.

8 The evidence of the occupants is that originally they thought James Lindenias and Deborah Lindenias were the owners, and it wasn't until June that they realized the plaintiff was the owner and James Lindenias and Deborah Lindenias were merely tenants. The occupants have continued to pay rent to James Lindenias and Deborah Lindenias, who apparently pay rent to the plaintiff.

9 It is the position of the occupants that they have a valid subtenancy, and, since the plaintiff was aware of their residing there and did nothing about it, the plaintiff has acquiesced in their residing there, and there is a relationship of landlord and tenant as between them and the plaintiff. The proper procedure is for the plaintiff to bring application for possession under Pt. IV (*Landlord and Tenant Act*, R.S.O. 1980, c. 232), which provides exclusive jurisdiction over these matters. Of course, counsel for the occupants doesn't deny that, on such a hearing, the plaintiff would in all probability lose, since he doesn't want possession for personal residence, but only to be able to sell.

10 Mr. Cruickshank had raised his submissions by way of preliminary objection, which I had reserved after hearing argument.

11 While, as a matter of law, I appreciate that the moving party must establish that there is no triable issue in order to be able to obtain summary judgment, in my opinion, in the circumstances of this case, the motion should be granted.

12 I agree with the submission of the plaintiff that the situation between James Lindenias and Deborah Lindenias and the occupants is one of subletting, not an assignment, since they didn't purport to assign the whole of their lease with the plaintiff.

13 On the evidence, I do not find there was any consent by the plaintiff to the purported sublet. I draw a negative inference from the failure of either James Lindenias or Deborah Lindenias to give evidence on this issue, and the authorities are clear that any consent must be obtained before, not after, the sublet.

14 I am also of the opinion that even if the plaintiff was aware in June of the occupants in the basement, in the circumstances here, the mere knowledge of same, considering the Lindenases had a lease until February 28, 1990, did not constitute acquiescence to their presence so as to constitute a relationship of landlord and tenant between owner and occupants.

15 I categorically reject Mr. Cruickshank's argument that the plaintiff's awareness of the occupants living in the basement apartment and failure to take any legal steps at that time created a third landlord and tenant relationship (between owner and occupants) — clearly there were [sic] such as between the plaintiff and the Lindenases and the Lindenases and the occupants.

16 In my view, there being no actual consent, or deemed acquiescence, the occupants are therefore trespassers and must vacate the premises on reasonable notice.

17 The situation here appears to have been envisaged by D. Lamont, Q.C., in 4th ed. of *Residential Tenancies* (Toronto: Carswell & Co., 1983); at p. 120 it states: "It is suggested that landlords' [sic] only remedy is to consider the subtenant or

assignee as a trespasser and to commence an ordinary action for possession." This was upheld in *Days vs. Feder Ont. Co. Ct.* 13 April 1979 (unreported).

18 I have obtained the decision from Mr. Lamont's office, and the decision supports the above statement.

19 I also feel that the reasoning in the decision of *Wright-Williams Management v. Wilson* (1982), 40 O.R. (2d) 18 (Co. Ct.) and *Chin v. Dejager*; *Chin v. West* (1988), 29 O.A.C. 372 (Div. Ct.), is applicable to the case at Bar.

20 Even if I were to take a different view from that expressed above, in my view James Lindenias and Deborah Lindenias would only have the legal right to sublet to the occupants for the duration of their lease with the plaintiff.

21 For the foregoing reasons, the motion for summary judgment will be granted, and judgment will issue in accordance with relief requested in the statement of claim.

22 While the occupants have had since October to have vacated, since this matter is not under the *Landlord and Tenant Act*, but is an ordinary action, while I will direct that a writ of possession may issue, on the basis that defendants Stacey Harrison and Kim Shende are trespassers and that the purported sublet at best could not extend past February 28, 1990, the occupants may remain until April 30, 1990 (to pay rent to the plaintiff, since the lease between Deborah Lindenias and James Lindenias expires on February 28, 1990) — payment of rent to the plaintiff will *not* create any landlord and tenancy relationship between the plaintiff and these occupants. If the occupants fail to do so, the plaintiff may apply to me on 3 days' written notice to vary my order. As long as the occupants may rent and comply with their obligation to treat the premises in a reasonable manner, the plaintiff will take no steps under the writ of possession, until May 1, 1990.

23 Counsel may speak to the issue of costs, one mutually convenient morning in chambers.

*Motion granted.*