

1977 CarswellOnt 255  
Ontario Supreme Court [High Court of Justice]

Phillips v. Kranjcec

1977 CarswellOnt 255, 4 C.P.C. 91

**Phillips v. Kranjcec et al.**

Maloney J.

Heard: August 22, 1977

Judgment: August 24, 1977

Counsel: *Marvin Zuker*, for applicant-defendants.

*R. B. Freeman*, for respondent-plaintiff.

Subject: Civil Practice and Procedure; Property

**Headnote**

Landlord and Tenant --- Residential tenancies — Termination of tenancy — Practice and procedure — General

Landlord and tenant — Whether possession of premises as against a trespasser may be obtained by action commenced by a specially endorsed writ — R. 33(1)(j) [re-en. O. Reg. 36/73, s. 4] — The Landlord and Tenant Act, ss. 82(1) and 107(1).

Writs — Special endorsements — Whether possession of premises as against a trespasser may be obtained by action commenced by a specially endorsed writ — R. 33(1)(j) [re-en. O. Reg. 36/73, s. 4] — The Landlord and Tenant Act, ss. 82(1) and 107(1).

In an action to recover possession of land a special endorsement alleging occupation of the premises without the owner's consent, as by way of trespass, is proper because the special requirements of The Landlord and Tenant Act dealing with residential tenancies are limited to agreements for occupation. For the purpose of determining the propriety of resort to a specially endorsed writ the allegations in the endorsement must be taken as true.

Appeal from Master's order dismissing application to strike out special endorsement.

***Maloney J. (orally):***

1 The defendants appeal from an order of Master Garfield by which he dismissed their application to strike out a special endorsement, which reads in full as follows:

The plaintiff's claim is to recover possession of the following lands and premises:

All and singular that certain parcel or tract of land and premises situate, lying and being in the Borough of North York, in the Municipality of Metropolitan Toronto, and being the whole of Lot 33 according to Plan No. M-1221 filed in the Office of Land Titles at Toronto.

The following are the particulars:

1. The plaintiff is the registered owner of the premises.
2. The plaintiff purchased the premises in August of 1976 and took possession October 1, 1976. The defendants moved in with the plaintiff on November 5, 1976.
3. On 17th May 1977, the plaintiff moved out of the premises while the defendants have continued to reside in the premises.

4. The continued occupation of the premises by both defendants is without the consent or permission of the plaintiff, and the said defendants are trespassers thereon.

2 Counsel for the applicant referred to two authorities, *Breglia Invts. Ltd. v. Rock*, [1972] 1 O.R. 728, 24 D.L.R. (3d) 145 and *Morrow v. Morgan* (1920), 17 O.W.N. 280. In citing the *Breglia* case, counsel referred particularly to the words of Leach Co. Ct. J. at p. 730 as follows:

It would appear that in residential premises, possession can only be obtained by following the provisions of Part IV of the *Landlord and Tenant Act*. Section 82 (1) and s. 107 (1) appear to clearly indicate that these provisions supersede any other Act in this Province and that a writ of possession may now only be obtained under the provisions of the Act.

3 Accordingly, the proposition is urged upon me that even though the special endorsement alleges occupation without permission or consent and indeed alleges that the defendants are trespassers I should nevertheless, by reason of the fact that the property in question is apparently residential in nature, preclude the possibility of any relief under R. 33 (1) (j) [re-en. O. Reg. 36/73, s. 4] and require the plaintiff to proceed in accordance with the provisions of The Landlord and Tenant Act, R.S.O. 1970, c. 236, Part IV.

4 Counsel argues, that, on the wording of the endorsement itself, the defendants have resided in the premises for some time and that there must exist a "tenancy agreement" under s. 81(b) of The Landlord and Tenant Act, which reads:

81. (b) 'tenancy agreement' means an agreement between a tenant and a landlord for possession of residential premises, whether written, oral or implied.

5 It seems to me that in a case such as this where the endorsement alleges that the occupancy is entirely without the permission or consent of the owner and indeed in this case where it is alleged that the defendants are trespassers, I must take the allegations in the special endorsement at their face value and conclude for the purposes of this appeal that there is no tenancy agreement within the meaning of s. 81 (b) of Part IV of The Landlord and Tenant Act. I cannot go so far as to hold that an alleged trespasser is entitled to the benevolent provisions of The Landlord and Tenant Act relating to residential tenants.

6 I therefore dismiss the appeal. Costs to the respondent (plaintiff) in the cause.

*Appeal dismissed.*