

1993 CarswellOnt 2047  
Ontario Court of Justice (General Division)

Hooey v. Bomze

1993 CarswellOnt 2047, 38 A.C.W.S. (3d) 380

**Edward Hooey, Plaintiff and Avi Bomze and Wahab Nasir, Defendant**

Stach J.

Judgment: January 20, 1993

Docket: Toronto 92-LT-46785

Counsel: *Christopher J. Matthews, Esq.*, for Plaintiff.

*Michael G. Forrester, Esq.*, for Defendant.

Subject: Civil Practice and Procedure; Estates and Trusts

**Headnote**

Estates --- Actions involving personal representatives — Rights and liabilities of personal representative — Actions by personal representative — Right of action

***Stach J.:***

1 Until her death on August 9, 1992 Hedy Groves was the beneficial owner of and a resident in her own house at 204 Hilda Avenue in the City of North York. She has accounted the house in 1988 for a price of \$235,000. On October 21 1992, letters probate of her last will and testament were granted to Edward Hooey, her executor. The executor brings these proceedings under s. 74 of Part III of the Landlord and Tenant Act (LTA or the Act) claiming a Declaration that the Defendants tenants hold possession of 204 Hilda Avenue against the right of the landlord, and that they wrongfully refuse to do out of possession. The executor also claims a writ of possession.

**Outline of Facts**

2 Both Bomze and Nasir were tenants of Hedy Groves when she died. Bomze had been a tenant at 204 Hilda Avenue since 1988; he had also been a tenant of Hedy Groves for a period of years previously when she owned other unrelated premises. He says he had developed a friendship with her and that she found it useful to talk to him about decisions she had to make regarding the Hilda Ave. home. He says that, unlike her relatives, he was especially helpful to her in the 1 month period before she died. In fact, the position of Bomze in these proceedings is substantially predicated upon the assistance he alleges he provided to her just before her death.

3 The tenancy of Nasir is of much more recent origin. There is no evidence that Nasir provided similar assistance to Hedy Groves. In fact, Nasir did not give evidence.

4 The house on Hilda Avenue had just 1 kitchen and just 1 bathroom. The evidence establishes that Bomze and Nasir shared the kitchen and the bathroom with Hedy Groves. There was no written tenancy agreement. Bomze says he paid rent of \$400, on the first of every month. There were no records but I nevertheless infer that Nasir paid rent on similar if not identical terms. Neither of the defendants paid any rent from the time of Groves's death to the present (5 months) and none has been demanded by the executor. I find that Bomze and Nasir had a monthly tenancy.

5 On September 13 1992, the executor told Bomze that he would be cleaning up and selling the house. Although he was not a real estate agent, Bomze asked immediately if he could sell the house, inferring that a sale would proceed more smoothly if he were given that opportunity. Bomze, in effect, was trying to earn an unlawful commission, and when he was denied that

opportunity, said, that he would not allow the executor to sell the house from under him. On October 22 1992, the executor caused a Notice to Quit to be served on Bomze and Nasir pursuant to s. 28 of the LTA.

6 Effectively, Bomze attempted to cast himself in the role of the good-hearted humanitarian as compared to the less caring family members, and while I have little doubt that Bomze extended some kindnesses to Hedy Groves, I attach much less importance to them than does Mr. Bomze. I have the very definite impression, moreover, that Mr. Bomze is attempting to profit from his current advantage in having possession of the premises as compared to the executor who does not.

### **Legal Issues Raised by the Defendants**

7 The defendants raise several legal issues and some equitable ones. The defendants say:

1. that the executor's application is improperly brought under Part III of the LTA rather than Part IV;
2. that the relationship of landlord and tenant existed between the defendants and Groves and that, with her death, the executor does not have the requisite interest under the LTA or the power to bring this proceeding under Part III or at all;
3. that if Part IV of the LTA does not apply to these proceedings, then there exists even in Part III of the Act a power in the Court to relieve from forfeiture;
4. that on the facts of this case the Court should invoke that power to relieve in favour of the defendants.

### **Discussion**

#### ***Issue 1***

8 The definition of "residential premises" in s. 1 of the LTA excludes premises whose occupants are required to share a bathroom or a kitchen facility with the owner where the owner lives in the building in which the premises are located. While it is true that the passing of Hedy Groves raises a question about the present applicability of this definition, I hold that the operative time for determining this issue falls in the period while Hedy Groves still lived. I cannot accept in a circumstance like this that the death of the owner suddenly alters the character of the premises vis a vis the executor and the tenants for purposes of this application.

9 The parties agree that the Notice to Quit was served on October 22 1992. I hold that Part III of the LTA applies to these proceedings.

#### ***Issue 2***

10 Both at common law and under statute, real property vests in the executor or administrator who holds the property as trustee for the persons beneficially entitled thereto. "Landlord", as the term is defined in the Act, includes a person who is owner, the owner's heirs assigns and legal representatives, and in Part II and Part III also includes the persons entitled to possession of the premises. Accordingly, I cannot accept as meritorious the defendant's submissions on this point.

#### ***Issue 3.***

11 Authoritative case law in Ontario establishes that relief from forfeiture is an available remedy of the tenant under Part III of the Act. See the decision of Laskin JA (as he then was) in *Re Rexdale Investments Ltd. and Gibson*, [1967] 1 O.R. 251 (Ont. C.A.).

12 Counsel for the executor argued, however, that such relief is only available where a written tenancy agreement is in existence. He could cite no authority for that proposition but urged me so to hold on the basis that all of the reported decisions dealt only with written leases and that not one of them involved an oral tenancy agreement. On the view I take of the matter, however, it is unnecessary to rule on this point.

13 As I read the cases cited to me, relief from forfeiture under Part III of the Act is a remedy which may obtain in circumstances involving the non-payment of rent where the tenant is subsequently able to make the payment, or circumstances involving the tenant's breaches of covenants or conditions which can subsequently be made good without causing the landlord serious loss. In my opinion, this relief is simply not available in a situation where the landlord has properly served a valid notice to quit respecting an oral tenancy from month to month. In the latter circumstance, the landlord is merely exercising a lawful option specifically accorded to the landlord by the Act. The Act contemplates the termination of such tenancies in this fashion. There is nothing untoward about it.

14 In the present case, the notices to quit clearly evince the "landlord's" intention to terminate the tenancies of the defendants. The notices were valid and they were properly served. That is an end of the matter.

**Issue 4.**

15 For the reasons expressed in my discussion of the first 3 issues, it is unnecessary for me to deal with issue 4. Nevertheless, I think it prudent for me to indicate that in the view I take of the evidence, the defendants have not established a case for discretionary relief based on any reasonable test including that outlined by Cornish Co. Ct. J. as he then was in *FPJ Properties Ltd. v. Parkway Finch Food Services Ltd.* (1980) 16 R.P.R. 1 (Ont.) at p. 5.

**Conclusion**

16 An Order shall issue for a declaration under s. 76(2) of the Act that the defendants wrongfully hold against the landlord. A writ of possession shall issue in favour of the applicant. The applicant shall also have his costs.

17 Counsel, inasmuch as it is eminently preferable that costs be fixed. I will entertain your submissions.