



**Order under Section 69
Residential Tenancies Act, 2006**

Citation: Kunam v Hoffarth, 2024 ONLTB 31836

Date: 2024-05-03

File Number: LTB-L-044670-23

In the matter of: 61 HEADWATER RD
BOLTON ON L7E2W4

Between: Priyan Kunam

And

Steve Hoffarth



Landlord

Tenant

Priyan Kunam ('PK' or the 'Landlord') applied for an order to terminate the tenancy and evict Steve Hoffarth ('SH' or the 'Tenant') because: the Landlord in good faith requires possession of the rental unit for the purpose of residential occupation for at least one year. (L2 application)

This L2 application was heard by videoconference on April 3, 2024.

The Landlord, the Landlord's Legal Representative, Marc Z. Goldgrub ('LLR'), and the Tenant attended the hearing. The Tenant consulted with Tenant Duty Counsel prior to the commencement of the hearing.

Determinations:

Preliminary Issue

1. The Tenant raised a preliminary issue in respect of the validity of the N12 notice of termination. Both parties agreed the N12 notice that was served on the Tenant forms the basis of the L2 application. The notice set out a termination date of May 13, 2023 and the Tenant alleged that the end of a rental period under the tenancy has been the 14th day of every month. The Tenant claimed that the N12 notice was therefore defective and invalid, pursuant to subsection 48(2) of the *Residential Tenancies Act, 2006* (the 'Act').
2. The parties agreed that the tenancy began in October 2017 by way of a one-year lease entered into by the parties, and that after the first year, the tenancy reverted to a month-to-month tenancy.
3. The Tenant led 4 exhibits into evidence to support his allegation that the monthly rental period began, and still begins, on the 14th day of every month. Preceding the start of the tenancy, the Landlord indicated he would like to have a new tenancy start on "Oct 15th" (TT#1). The Tenant led two post-dated cheques into evidence -cheques dated May 15/2018 and June 15/2018 (TT#2). The Tenant adduced a prepared listing of rent payments between January 2022 and March 2024 – a total of 27 months (TT#3).

Supplementing TT#3, the Tenant submitted certain e-transfer payment receipts evidencing rent payments on the 14th day of the month (TT#4).

4. The Landlord led 3 exhibits to support the Landlord's assertion that the rental period began, and still begins, on the 15th day of every month. The first exhibit was a copy of the 1-year term signed lease between the parties (LL#1). The Landlord testified that the parties never agreed at anytime to change the rental start-date. The Landlord submitted copies of text message exchanges in March 2023 which address rent payments for March, April and May 2023 rent periods (LL#2). Finally, the Landlord led copies of "autodeposited" receipts for rents the Landlord received from the Tenant for January 2023 to June 2023 - nb. March 2023 is missing in those receipts (LL#3).
5. During cross-examinations, the parties provided additional information for consideration.
6. The Tenant acknowledged agreeing to, and signing, the lease which sets out the monthly rent period starting on the 14th of each month. He asserted that because the lease has expired, the initial agreed-to rent period start-date was no longer in effect. The Tenant acknowledged the parties never discussed changing the rent period start-date and there was no agreement entered into to do so. While many rent payments were made on the 15th of each month, the Tenant acknowledged having paid rents a number of times on the 14th of the month, and sometimes later than the 15th day of a month. When asked why only 2 cheques were submitted into evidence (TT#2), the Tenant testified that banking limitations prevented him from producing copies of more cheques.
7. The Landlord acknowledged that he never received any cheque that was dated for the 14th of a month. The Landlord confirmed that since 2017, rents for all rental periods have been paid by the Tenant. The Landlord testified that he never followed-up with the Tenant when rent was paid late (after the 14th as the Landlord contended), unless the Tenant had been 2 to 3 days late in paying rent.
8. Having considered the submissions of both parties, I find that on a balance of probabilities, the initial rental period start-date of the 14th of the month was not only agreed upon by the parties at the outset of the tenancy (LL#1 at paras. 6 and 7), it never changed throughout the tenancy.
9. I say this because the signed lease evidences the mutual agreement by both parties to create the tenancy start-date of October 14, 2017 and the monthly rental period start-date of the 14th of each month. This is clear evidence of a lawful contract being entered into.
10. Subsection 202(1) of the Act provides instruction to the LTB to look at the real substance of transactions between parties. It requires a search for intent.
11. Here, the testimonies and evidence establish, on a balance of probabilities, the parties entered into a mutual agreement to begin a tenancy on October 14, 2017, with the monthly rent becoming due of the 14th day of every month and consideration was exchanged in the way of two months' rent (first month's rent and last month deposit-para. 10 of LL#1).
12. For there to be a binding agreement to change a basic term such as a monthly rental start-date, it is necessary that the parties, in fact, enter into an agreement. This means that the various elements of a contract must be established on a balance of probabilities, namely, an offer, an acceptance, meeting of the minds or an intention to create a binding

amendment, and consideration – reference: *A. Swan, Canadian Contract Law, 2d ed. (Markham, ON: LexisNexis Canada, 2009) at 218, §4.8.*

13. None of this was established, and the parties even confirmed they never entered into any agreement to change the start-date. And any unilateral decision or action that is taken by one party cannot change a contract, which is in this case the signed lease.
14. I then looked to the activities of the parties and the pattern of events, to see whether an implicit agreement was ever reached.
15. The Tenant's own evidence shows in the 27 months of January 2022 to March 2024, he paid rents 16 times on the 15th of the month, 4 times on the 14th of the month, 3 times on the 16th of the month, 1 time on the 17th of the month, 1 time on the 24th of the month and 1 time on the 28th of the month. As claimed in the L2 application, the March 2023 rent was waived due to the statutory requirement for compensation. The Tenant made a notation that the two very late payments (the 24th and 28th dates) were made due to what he termed as "confusion" stemming from the N12 notice, the last month's rent deposit that had to be applied and the one-month compensation that was to be paid.
16. If the Tenant's position was that rent was due on the 15th day of every month, it was never explained to me why he would have paid rents "early" for 4 different monthly rents in 2022 that is on the 14th day of those months. In my view, it seems more likely than not that the 14th day was still the operative due date the parties were working to in 2022, and that the Tenant simply got into a routine of paying monthly rents one day late – that is on the 15th for the majority of months -- with the Landlord not reacting (as he testified he did not react until 2-3 days of lateness had occurred).
17. I also noted that the Tenant presented little to no evidence in the four years of 2018 to 2021, except for two cheques in May 2018 and June 2018 and an explanation that no further cheques were available due to banking limitations. This evidence did little to establish a pattern of events related to or support the position of the Tenant overall. Finally, I was given to consider a text message exchange in March 2023 in which the Landlord sets out the rental period for three months during the parties' discussion about current rent, last month's rent and the one-month compensation payment. In that exchange, the Landlord clearly identified the 14th day of the month as the start-date for the monthly rent period, and nothing was adduced by the Tenant to suggest from that specific exchange, the Tenant believed otherwise.
18. All this to say that the pattern of events and actions of the parties did not persuade me in any substantive way that the monthly rental start-date was ever changed by implicit agreement. The best evidence I was given to consider was the signed lease, which I find has remained the basis for the governing terms of the tenancy, and here more specifically, the term relating to the monthly rental start-date.

Merits of the L2/N12 application

19. As explained below, the Landlord has proven on a balance of probabilities the grounds for termination of the tenancy and the claim for compensation in the application. Therefore, the termination of the tenancy will be postponed to June 30, 2024, and daily compensation will apply for any overstay in the tenancy starting on July 1, 2024.

20. The Landlord testified concerning the circumstances that led him to decide that he and his family would need to move into the rental unit. He stated he owned a gas station business in Windsor, with stations in North Carolina and Belle River, Ontario. He stated that he started have financial woes in 2019, but held on by financing and refinancing. The Landlord testified that due to “cash crunches”, he twice communicated with the Tenant about selling his rental unit property, in 2019 and in December 2020. In cross-examination, he clarified that during those two times, he was only going to sell the rental unit property so as to maintain his gas station business. When asked why he never replied to the Tenant’s text message reply to LL#5 (exhibit TT#5), the Landlord stated he had replied orally and thought he was clear about his intent to move in, so he never sent a reply text to Tenant’s May 24, 2023 text (TT#5).
21. The Landlord stated that eventually, his gas station business had drained his financial position to the point that he had to sell his North Carolina station to his partner (LL#5-copy of signed transfer agreement, June 2023), and sell his remaining business. He confirmed he no longer has any gas station business.
22. As part of his sell-off, Landlord testified he decided to move back into the rental unit and in early March 2023, he told the Tenant of his plans (LL#4) and gave the Tenant the N12 notice. He said the Tenant did not receive the news well. As it was, the Landlord stated he vacated his Belle River home in May 2023, so that he could move into the rental unit. He confirmed he paid the one-month compensation by waiving the March 14-April 13, 2023 rent (LL#3). Since moving out, the Landlord stated he is living in a temporary location, but is anxious to move into the rental unit home. In March 2024, he confirmed his wife enrolled their son into a Bolton area school for September (LL#6).
23. The Tenant testified that the Landlord started to threaten possible termination of the tenancy and eviction in and about November 13, 2019 and continuing into December 2020 (TT#6). The Tenant also submitted that in December 2022, bad weather caused a part of the backyard fence to collapse, which he alerted the Landlord to (also part of TT#6).
24. When the Landlord presented him with the N12, the Tenant testified he had received mixed messages in the past about the Landlord’s true intentions. He started to think perhaps the Landlord had wanted to evict him so he could “jack” up the rent with a new tenant (TT#5). In final arguments, the Tenant again stated his suspicion that the Landlord will not move into the rental unit, but will re-rent it out to another tenant for higher rent.

Analysis

25. I considered both parties’ submissions in a contextual manner, and based on those submissions, I find that the Landlord in good faith requires possession of the rental unit for residential occupation for a period of at least one year.
26. I am satisfied on a balance of probabilities that there is no ulterior motive involved other than the Landlord wanting to move into the rental unit for his own residential occupation. I accept that his decision to move in resulted from his selling off of his business and his plans to restructure his and his family’s life. I understand the Tenant may not believe the Landlord, but there was nothing more provided other than the Tenant’s speculative suspicion. I am more persuaded by the actual evidence that was adduced. The Landlord’s evidence well supports his testimony, which was unshaken by cross-

examination. Even the Tenant's evidence – in particular TT#6 (text messages) – supports the Landlord's testimony of a failing business and financial woes, which the Landlord spoke about as part of his submissions.

27. The pattern of conduct and actions as testified-to by the Landlord were in my view, quite consistent in respect of his declared intention to move into the rental unit. This all spoke to me of a good faith intention to move in.
28. While there was a collapsing of a backyard fence in December 2022 and while the Landlord repeatedly communicated with the Tenant about possibly selling the property due to financial difficulties, none of this, in my view, rose to a level of serious breach of the Landlord's responsibilities under the tenancy that subsection 83(3)(a) provisions for. The collapsed fence due to inclement weather was something the Landlord had to address as part of his regular maintenance obligations. The Landlord's communications with the Tenant about possible sale were nothing more than the Landlord keeping the Tenant abreast of the Landlord's own problems that might have affected the tenancy.
29. Case law has established that the "good faith" requirement in section 48 of the Act means that the intended person genuinely intends to occupy the rental unit. My finding of good faith here is consistent with case law.
30. In *Feeny v. Noble*, 1994 CanLII 10538 (ON SC), 19 O.R. (3d) 762, the Ontario Divisional Court considered this issue in the context of subsection 103(1) under the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, and held that:

"...the test of good faith is a genuine intention to occupy the premises and not the reasonableness of the landlord's proposal".

31. In *Salter v. Beljinac*, 2001 CanLII 40231 (ON SCDC), [2001] O.J. No 2792, the Divisional Court revisited the issue under subsection 51(1) of the *Tenant Protection Act*, 1997, S.O. 1997, c. 24. The court referred to Feeney, supra, and held that:

"...the legal standard for the Tribunal as finder of fact remains the same under s. 51(1) of the TPA as seen in the case law interpreting s. 103(1) of the LTA."

32. More recently, in *Fava v. Harrison*, 2014 ONSC 3352 (CanLII) the Divisional Court, in considering this issue in the context of the Act, found as follows:

"We accept, as reflected in Salter, supra, that the motives of the landlord in seeking possession of the property are largely irrelevant and that the only issue is whether the landlord has a genuine intent to reside in the property. However, that does not mean that the Board cannot consider the conduct and the motives of the landlord in order to draw inferences as to whether the landlord desires, in good faith, to occupy the property."

One-month Compensation

33. The parties in effect agreed that the one month compensation was paid by way of the waiving of rent in March 2023. I find this demonstrates compliance with subsections 48.1 and 55.1 of the Act.

Daily (per diem) compensation, rent deposit

34. The Landlord requested daily compensation in the L2 application, and generally the LTB orders compensation from the day after the N12 termination date (i.e starting May 14, 2023) to the date of the hearing (March 26, 2024) – a total of 318 days. However, the parties agreed before me that all rents have been paid in full up to the date of the hearing, so I am not ordering the amount to be paid, but will only show the calculation of compensation hereto for the sake of completion/form.
35. Based on the monthly rent, the daily compensation is \$69.04. This amount is calculated as follows: \$2,100.00 x 12, divided by 365 days.
36. The compensation payable by the Tenant to the Landlord for this 318-day period equals \$21,954.72. Beyond March 26, 2024, daily compensation will be set out in the order and will need to be accounted for between the parties, separately.
37. Based on the submissions and more particularly to exhibits TT#3 and LL#3, I was left to conclude the last month's rent deposit was never applied to any month and therefore the Landlord is still in possession of the deposit.
38. The Landlord collected a rent deposit of \$2,100.00 from the Tenant on October 14, 2017. The interest owing on the deposit is \$332.60 and covers the period from October 14, 2017 to March 26, 2024.
39. The amount of the rent deposit and interest on the rent deposit is applied to the amount the Tenant is required to pay.

Relief from eviction

40. On the matter of termination of the tenancy (eviction), the parties made submissions in respect of their circumstances. The Tenant's submissions included employment issues with his spouse currently not working and his connection to the community. The Landlord's submissions included the need to undertake some work to prepare the rental unit for his family and the need for his child to start school in September.
41. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the Act, and find that it would not be unfair to postpone the eviction until June 30, 2024, pursuant to subsection 83(1)(b) of the Act.

It is ordered that:

1. The tenancy between the Landlord and the Tenant is terminated as of June 30, 2024.
2. The Tenant must move out of the rental unit on or before June 30, 2024.
3. If the unit is not vacated on or before June 30, 2024, then starting July 1, 2024, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
4. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlord on or after July 1, 2024.

5. The Tenant shall also pay the Landlord compensation of \$69.04 per day for the use of the unit starting March 27, 2024 (the day after the hearing date) until the date the Tenant moves out of the unit.
6. The Landlord owes the Tenant \$2,432.60, which is the amount of the rent deposit and interest on the rent deposit, and this is to be deducted from the amount owing by the Tenant pursuant to paragraph 5 above.
7. As the Tenant continues to pay his monthly rents, and because the rent deposit and interest will need to be credited/applied, the parties are directed to account separately for all amounts due, paid or credited up to the date the Tenant moves out of the rental unit.
8. If the Tenant does not pay the Landlord the full amount owing as a result of this order on or before June 30, 2024, the Tenant will start to owe interest. This will be simple interest calculated from July 1, 2024 at 7.00% annually on the balance outstanding.



Alex Brkic
Member, Landlord and Tenant Board

May 3, 2024
Date Issued

15 Grosvenor Street, Ground Floor,
Toronto ON M7A 2G6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

In accordance with section 81 of the Act, the part of this order relating to the eviction of the Tenant expires on January 1, 2025 if the order has not been filed on or before this date with the Court Enforcement Office (Sheriff) that has territorial jurisdiction where the rental unit is located.