Order under Section 69
Residential Tenancies Act, 2006

Citation: Janakan v Gale, 2024 ONLTB 2629
Date: 2024-01-24
File Number: LTB-L-071946-22

In the matter of: Main Floor, 284 GROVE ST E
BARRIE ON L4M2R3

I hereby certify this is a true copy of an Order dated
Jan 24, 2024
Landlord and Tenant Board

Between: Sujeetha Janakan — Landlord

And

Corry Gale
Michael Gale — Tenants

Sujeetha Janakan (the 'Landlord') applied for an order to terminate the tenancy and evict Corry Gale ('C.G') and Michael Gale ('M. G') (the 'Tenants') because:

- the Tenants, another occupant of the rental unit or someone the Tenants permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant.

This application was heard by videoconference on December 11, 2023.

The Landlord and Landlord's Agent, S. Tahmbriajah, and the Tenant, Corry Gale ('C.G'), attended the hearing.

Determinations:

The Tenants' Preliminary Motion

1. At the hearing, C.G raised an issue with respect to the N5 notices of termination she received. Specifically, C.G. claimed that she never received a voidable N5 notice of termination from the Landlord. C.G. testified that she only received two N5 notices from the Landlord and both of them indicate that they are not voidable.
2. In general, when a landlord seeks to evict a tenant under the "substantial interference" ground for termination, they must first give the tenant a "first" N5 notice under section 64 of the *Residential Tenancies Act, 2006* (the 'Act'), which gives the Tenant seven days to correct their behaviour and void the notice. The landlord can then give the tenant a second, non-voidable notice under section 68 of the Act if there is a further substantial interference more than seven days but less than six months after the first notice was given.
3. In this case, C.G. testified that she received two N5 notices from the Landlord – one signed September 13, 2022 (termination date September 30, 2022) and the other signed November 23, 2022 (termination date December 13, 2022) – and both of them are marked

as “second”, non-voidable notices. C.G. testified that since she never received a first, voidable N5 notice, the Landlord was not entitled to serve a second N5 notice and, therefore, the notices she received are invalid.

4. On the other hand, the Landlord’s position was that he did serve a first, voidable N5 notice on the Tenants. The Landlord’s agent testified that he mailed a voidable ‘first’ N5 notice to the Tenants on August 19, 2022. This notice is in the LTB’s file. It is dated August 19, 2022 and has a termination date of September 30, 2022. There is a certificate of service in the LTB’s file that also states that the Landlord’s agent mailed the first N5 to the Tenants on August 19, 2022. Interesting, the Landlord and the Landlord’s agent did not recognize the notice that C.G. produced dated September 13, 2022. They testified that they did not prepare it or send it to the Tenants.

5. This is a very peculiar situation. However, the relevant question before me is whether I am satisfied that the Landlord gave the Tenants a first voidable N5 notice – i.e. the notice signed August 19, 2022. I have no reason to doubt the Landlord’s evidence that they mailed this notice to the Tenants, consistent with both their testimony and the certificate of service in the LTB’s file.

6. Section 191 (1) of the Act states that: 1) A notice or document is sufficiently given to a person other than the Board, (f) by sending it by mail to the last known address where the person resides or carries on business. Section 191(2) of the Act states that a notice that is given by mail is deemed served on *the* fifth day after mailing. I am satisfied that the Landlord mailed the 1st N5 on August 19, 2023, and it was deemed served on August 24, 2022. It is peculiar that the Landlord’s agent doesn’t recall the September 13th N5 notice. However, this is irrelevant because the Landlord filed the application based on the second N5 notice, signed November 23rd. The application proceeded on that basis. Throughout the remainder of the order, the N5 notice signed August 19, 2022, is referred to as the ‘1st N5’ and the N5 notice signed November 23, 202 is referred to as the ‘2nd N5’.

Allegations in the N5 Notice of Termination:

7. On August 19, 2022, the Landlord gave the Tenants the voidable 1st N5, deemed served August 24, 2022. Therefore, the Landlord was allowed to give the Tenants a second, non-voidable notice of termination under section 68 of the Act.

8. On November 23, 2022, the Landlord gave the Tenants the 2nd N5 deemed served on November 28, 2022. The notice alleges that the Tenants substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another Tenants. The details in the notice focus on a single event – a complaint from the upper-level tenant on November 22, 2022, about the C.G continuously smoking in the house and giving that tenant chest pain and a bad cough.

9. At the hearing, the Landlord testified about this complaint that she received from the upper-level tenant by text message. The text mentioned, 'I am getting chest pain and a bad cough.' The Landlord submitted this text message as evidence during the hearing. However, the Landlord did not provide any direct evidence to corroborate their claim. The Landlord did not call the complaining tenant to testify at the hearing and she did not

present any evidence that she independently investigated the complaints on November 22, 2022.

10. On the other hand, C.G testified that she did not smoke in the housing on November 22, 2022, around 7:03 a.m. She testified that due to her son's asthma condition, she never smokes inside the house. Moreover, she denied the allegations, testified that there is no direct front window to the upper-level unit from the porch of the property. C.G explained that when she smokes outside, the smoke smell cannot reach the upper unit.

Analysis

11. The upper-level Tenant did not attend the hearing to testify or provide any direct evidence or oral testimony regarding the reported complaints. Since the complaining tenant did not attend the hearing, the Tenants were not able to cross-examine the complaining tenant or challenge the evidence in any meaningful way. In addition, neither the Landlord nor Landlord's agent witnessed the November 22, 2022's incident, but rather relied on the upper-level Tenants' text message as her testimony. I did not hear any evidence that they witnessed the Tenants smoking in the rental unit or that they were able to directly and independently verify the other tenant's complaint.

12. C.G denied the allegation concerning the event of November 22, 2022, and provided direct oral testimony during the hearing. Although hearsay evidence is allowed by Statutory Powers Procedure Act ('SPPA'). s15(1), I must determine the weight to be given to it. For the reasons outlined above, I would assign the evidence of the upper-level unit tenant's complaints to the Landlord virtually no weight at all. Instead, I prefer the Tenant's direct evidence that she did not smoke in the rental unit as alleged on November 22, 2022. The Tenant's evidence was consistent, and I have no reason to doubt its reliability.

13. In short, I prefer the Tenant's direct evidence over the Landlord's hearsay evidence. I find that this approach is consistent with the Divisional Court's decision in *Manikam v. Toronto Community Housing Corporation*, 2019 ONSC 2083.

14. As a result, I do not find that the Landlord has met the burden of proof and demonstrated that it is more likely than not that the Tenants engaged in the behaviour alleged in the 2nd N5 and substantially interfered with his or another tenants' reasonable enjoyment of the residential complex.

It is ordered that:

1. The Landlord's application is dismissed.

January 24, 2024
Date Issued

Joy Xiao
Member, Landlord and Tenant Board

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.