



Order under Section 98  
**Residential Tenancies Act, 2006**

**File Number:** TST-12845-20

**In the matter of:** 33 ACHTMAN LANE  
TORONTO ON M6G4C5

**Between:** Ethan Baron Tenants  
Piotr Jan Krochmal

**and**

Xiaoqin Hu Landlord

Ethan Baron and Piotr Jan Krochmal (the 'Tenants') applied for an order determining that Xiaoqin Hu (the 'Landlord') arbitrarily or unreasonably withheld consent to assign the rental unit.

This application was heard by videoconference on May 25, 2021.

Piotr Jan Krochmal on behalf of both Tenants and the Landlord attended the hearing. }

The Tenant declined speaking with Duty Counsel prior to the hearing.

**Determinations:**

Preliminary Issues

1. On consent of the parties, Piotr Jan Krochmal was added as a Tenant on the application.
2. The Tenant requested to amend the application, as per the email sent February 7, 2020, to include the Landlord to pay the Tenants \$4,648.28 which represents the last month rent deposit (\$4,400.00) minus the per diem days in the unit February 1 to 2, 2020 (\$151.72) plus the key deposit (\$400.00).
3. The Landlord objected to the amendment because the amount requested is not on the application.
4. Although the Board did not receive the email the Tenant referred to, I granted the request to amend because if the Tenants are successful in their application then the Landlord is legally liable to return this money to them.

Merits

5. For the reasons that follow, I find the Tenants asked for the Landlord's general consent to assign the rental unit and the Landlord refused to consent. I find this refusal is

unreasonable and arbitrary. Therefore, I find that the Landlord has unlawfully withheld consent to assign the rental unit.

*Tenant's testimony*

6. The Tenant testified that on December 17, 2019, the Tenants signed the rental application. They paid \$8,800.00 for the first and last month's rent and \$400.00 for the key deposit on December 22, 2019. The Tenants signed the lease on December 24, 2019, for the term January 1, 2020 through August 31, 2021. The receipts and the lease were entered into evidence.
7. After entering into the tenancy agreement, the Tenants realized that using the unit for the purpose of Airbnb was not permitted under the tenancy agreement based on the condominium board rules.
8. On January 3, 2020 at 10:59 a.m., the Tenants emailed the Landlord about being allowed to terminate the tenancy or assign.
9. The same day, at 1:49 p.m., the Landlord replied advising the Tenants they were legally liable for the full 21-months and offered two options:

Option 1

- Send N9 Tenant's Notice to End the Tenancy (attached) with a **60-day notice**. Your obligations under ATL include. Rental payment remain unchanged during the notice period. For example, if you wish to terminate your tenancy on March 5, 2020, you are still obliged to pay rents for Feb 1 – Mar 5.
- Your last month rent deposit has already been deducted by the brokerage and cannot be refunded.
- The key and cleaning deposits will be refunded at the end of the tenancy.
- Allow the property to be shown to prospective Tenants or Purchasers immediately. Keep the place presentable all the time from now to the termination date.

Option 2

- We both agree to end the tenancy **August 31, 2020**. The rest of the ATL remain unchanged ie. no Airbnb. N9 required.
  - Allow property to be shown to prospective Tenants or Purchasers from July 1, 2020 onwards. Keep the place presentable all the time from July 1 to August 31, 2020.
  - Your last month rent deposit has already been deducted by the brokerage and cannot be refunded.
  - The key and cleaning deposits will be refunded at the end of the tenancy.
10. On January 3, 2020 at 2:36 p.m., the Tenants emailed the Landlord advising that they would be assigning, and that assignment was allowed in Ontario and cannot be unreasonably refused. At 2:54 p.m. the Landlord emailed, "Assignment not allowed as qualified assignee hard to come across for this price segment", therefore, at 2:59 p.m., the Tenants emailed the Landlord the signed N9 notice with a termination date of February 2, 2020.

11. At 3:11 the Landlord replied "This is not acceptable. It's not likely to find a tenant in one month. 2 month is more likely. You can try assignment but the landlord still needs to approve the assignee ie. employment, income, credit score etc. Be happy to go to LTB or small amount court anytime."
12. The email thread and N9 notice were entered into evidence.
13. The Tenants handed the keys into the agent's office on January 5, 2020, as indicated by the key receipt that was entered into evidence.
14. The Tenant submitted that as demonstrated by the first January 3, 2020 email, the Landlord unreasonably withheld consent to assign. The Landlord did not agree to assign until after they sent the N9 notice terminating the tenancy pursuant to the legislation.
15. The Tenant also submitted that the Landlord has still not returned the last month rent or key deposit, which she is legally required to do.

*Landlord's testimony*

16. The Landlord testified that the Tenants entered into a 21-month lease, they were accepted based on their salaries. Her email that assignment is not allowed was not unreasonably rejecting assignment, she told them that it is hard to find an assignee for the rental price point. Further, within 1 hour and 17 minutes she said they could try assignment; therefore, she did not arbitrarily refuse because she retracted her first response.
17. The Landlord also testified that the Tenants never presented any potential assignees for her to approve. Plus, even if they had, assignment means the Tenants would stay in the property and someone else would take over the lease.
18. The Landlord further testified that there is no evidence that the Tenants ever resided in the unit, they did not move in or intend to. Therefore, the nature of the tenancy was commercial, therefore the Residential Tenancies Act does not apply, and the Board has no jurisdiction to hear this matter. It is clear from day 1 that the Tenants wanted to profit from the property. As soon as they found out they could not use for Airbnb purposes they broke the lease without proper notice.
19. The Landlord submitted that she did not unreasonably or arbitrarily withhold consent, therefore the N9 notice is invalid. As such she is requesting the Board compensate her \$5,018.91 for the extra costs incurred because the Tenants vacated improperly. The Landlord did not present any evidence to support this request.

Analysis  
*Jurisdictional Issue*

20. The Landlord submitted that the Board does not have jurisdiction because the nature of the tenancy was commercial because the Tenants never moved in, and never intended to; they wanted to use the unit as an Airbnb.
21. Here, the evidence establishes that a residential lease was signed by the parties, therefore, on its face the tenancy was residential in nature. However, section 202 of the *Residential Tenancies Act, 2006* (the 'Act') stipulates that in making findings on an application the Board must first ascertain the real substance of all transactions and activities and may disregard the outward form of a transaction.
22. In the email thread entered into evidence the Tenants say:

December 30, 2019: Ethan and I are going away from Toronto and away from Canada to Europe during the summer time, We thought that there will be no issue for Airbnb or short term rentals once we are away.

January 1, 2020: The property will be Piotr's primary residence, and the idea would be to have short-term guests while he is present and away.

23. In an email dated January 3, 2020, the Tenants admit that AirBnB was central to their decision to lease the rental unit, the undisputed evidence before me indicates that the unit was going to be used as at least one of the Tenant's primary residence. Although it is unclear if both Tenants would be residing there all the time, one did intend on living there, therefore the unit was to be used for residential occupation.
24. Further, in an email to the Tenants the property manager says, with respect to AirBnB, says, "Literally, every lease agreement has this clause and it is heavily protected by the Residential Tenancy Act". Therefore, even after learning of the Tenants' intention, the property management company considered the tenancy to be residential in nature.
25. Therefore, for all of the above reasons, I find the Board has jurisdiction over this matter.

*Assignment Issue*

26. The applicable sections of the Act say:

**95 (1) Subject to subsections (2), (3) and (6), and with the consent of the landlord, a tenant may assign a rental unit to another person.**

**(2) If a tenant asks a landlord to consent to an assignment of a rental unit, the landlord may,**

- (a) consent to the assignment of the rental unit; or**  
**(b) refuse consent to the assignment of the rental unit.**

(3) If a tenant asks a landlord to consent to the assignment of the rental unit to a potential assignee, the landlord may,

- (a) consent to the assignment of the rental unit to the potential assignee;
- (b) refuse consent to the assignment of the rental unit to the potential assignee; or
- (c) refuse consent to the assignment of the rental unit.

**(4) A tenant may give the landlord a notice of termination under section 96 within 30 days after the date a request is made if,**

**(a) the tenant asks the landlord to consent to an assignment of the rental unit and the landlord refuses consent;**

(b) the tenant asks the landlord to consent to an assignment of the rental unit and the landlord does not respond within seven days after the request is made;

(c) the tenant asks the landlord to consent to an assignment of the rental unit to a potential assignee and the landlord refuses consent to the assignment under clause (3) (c); or

(d) the tenant asks the landlord to consent to an assignment of the rental unit to a potential assignee and the landlord does not respond within seven days after the request is made.

**(5) A landlord shall not arbitrarily or unreasonably refuse consent to an assignment of a rental unit to a potential assignee under clause (3) (b).**

(6) Subject to subsection (5), a landlord who has given consent to an assignment of a rental unit under clause (2) (a) may subsequently refuse consent to an assignment of the rental unit to a potential assignee under clause (3) (b).

(7) A landlord may charge a tenant only for the landlord's reasonable out-of-pocket expenses incurred in giving consent to an assignment to a potential assignee.

(8) If a tenant has assigned a rental unit to another person, the tenancy agreement continues to apply on the same terms and conditions and,

(a) the assignee is liable to the landlord for any breach of the tenant's obligations and may enforce against the landlord any of the landlord's obligations under the tenancy agreement or this Act, if the breach or obligation relates to the period after the assignment, whether or not the breach or obligation also related to a period before the assignment;

(b) the former tenant is liable to the landlord for any breach of the tenant's obligations and may enforce against the landlord any of the landlord's obligations under the tenancy agreement or this Act, if the breach or obligation relates to the period before the assignment;

(c) if the former tenant has started a proceeding under this Act before the assignment and the benefits or obligations of the new tenant may be affected, the new tenant may join in or continue the proceeding.

(9) This section applies with respect to all tenants, regardless of whether their tenancies are periodic, fixed, contractual or statutory, but does not apply with respect to a tenant of superintendent's premises.

**96 (1) A tenant may give notice of termination of a tenancy if the circumstances set out in subsection 95 (4) apply.**

(2) The date for termination specified in the notice shall be at least a number of days after the date of the notice that is the lesser of the notice period otherwise required under this Act and 30 days.

[Emphasis added]

27. Here, the evidence and testimony establish that the Tenants made a general request to assign the unit on January 3, 2020, and when the Landlord told them that assignment was not allowed, they filled out the N9 notice of termination and sent it to the Landlord. Although the Landlord changed her mind and said they could try assigning, she did this after the Tenants had sent the termination notice to her.

28. Further, as the Landlord refused the general request to assign, the Tenants were not under any obligation to find a specific potential assignee. They were permitted to terminate their tenancy in accordance with the Act once the general consent to assign was refused.
29. The termination date in the notice was February 2, 2020. The notice was signed and dated January 3, 2020; therefore, the termination date was the required 30 days pursuant to sections 95(4) and 96(1). As such, the notice and the termination date are valid.
30. Therefore, based on the evidence and testimony before me, I find that the Landlord arbitrarily and unreasonably withheld consent to assign the rental unit, and consequently, the Tenants validly terminated their tenancy with the N9 notice of termination on February 2, 2020.
31. As the tenancy was validly terminated on February 2, 2020, the Tenants are entitled to the return of their last month rent deposit minus the per diem amount for February 1 and 2, 2020, in the amount of \$4,100.68 plus the key deposit of \$400.00, for a total of \$4,510.68 calculated as follows:

$$\begin{aligned} & \$4,400.00 \text{ rent} \times 12 \text{ months} = \$52,800.00 \div 365 \text{ days in a year} = \$144.66 \text{ per day} \\ & 2 \text{ days} \times \$144.66 = \$289.32 \\ & \$4,400.00 - \$289.32 = \$4,100.68 \end{aligned}$$

32. It should be noted that at the hearing it was pointed out to the Landlord that her understanding of how assignment works was not accurate.
33. This order contains all the reasons for the decision within it. No further reasons shall be issued.

**It is ordered that:**

1. The tenancy is terminated February 2, 2020, the date indicated in the N9 notice.
2. The Landlord shall also pay the Tenants \$50.00 for the cost of filing the application.
3. The Landlord shall pay the Tenants the full amount owing by November 7, 2021.
4. If the Landlord does not pay the Tenants the full amount owing by November 7, 2021 the Landlord will owe interest. This will be simple interest calculated from November 8, 2021 at 2.00% on the outstanding balance.

**October 27, 2021**  
**Date Issued**

  
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Diane Wade  
Member, Landlord and Tenant Board

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