



Order under Sections 31, 69 & 135
Residential Tenancies Act, 2006

File Number: TNL-13252-19 &
TNT-12882-19

In the matter of: 33 DANESWOOD ROAD
NORTH YORK ON M4N3J7

Between: Eda Di Pierdomenico Landlords
Nazzeno Sagripanti

And

Beverly Smith Tenants
Hugh Smith

Eda Di Pierdomenico and Nazzeno Sagripanti (the 'Landlords') applied for an order to terminate the tenancy and evict Beverly Smith and Hugh Smith (the 'Tenants') because the Tenants did not pay the rent that the Tenants owe.

The Tenants applied for an order determining that the Landlords have collected or retained money illegally.

The Tenants also applied for an order determining that the Landlords harassed, obstructed, coerced, threatened or interfered with them, entered the rental unit illegally, altered the locking system on a door giving entry to the rental unit or residential complex without giving them replacement keys and substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household.

These applications were heard in Toronto on October 10, 2019, and on May 18, 2021.

The Landlords, the Tenant, B. Smith, and the Tenants' legal representative, M. Zarnett, attended the hearing.

Determinations:

1. There are three applications before the Board, two initiated by the Tenants and one initiated by the Landlords.
2. The Landlords claim arrears of rent. The Tenants allege that the Landlord unlawfully retained the last month's rent deposit, unlawfully withheld payment of interest on the last month's rent deposit, and they allege that the Landlords substantially interfered with their

reasonable enjoyment of the rental unit, and harassed, obstructed or threatened the Tenants, as well as conducted illegal entries of the rental unit.

3. The outcome of all three applications is dependent on a determination of the nature of the lease between the parties, and consequently, a determination of the lawful monthly rent that the Tenants were obligated to pay the Landlords.

The Tenancy Agreement:

4. The rental unit is a house. The Tenants began living in the rental unit in 2014.
5. The undisputed evidence is that the parties signed a 10 or 11 month (it varied in different years) written lease agreement, commencing every year in mid-August or September. The Tenants rarely spent time in the house in July or August each year.
6. It is undisputed that both parties understood that the Tenants would occupy the house only very infrequently in July or August. The Tenants kept all their belongings in the house throughout the year, including July and August. It is also undisputed that, until the summer of 2018, the Tenants would freely access the rental unit throughout the year, and that the Tenants continued to pay utilities like hydro, water and lawn maintenance throughout the year.
7. The Tenants lived in the rental unit continuously from August 15, 2014, when the first lease commenced, until June 30, 2020, when they vacated the rental unit.
8. The Tenants signed a new lease each year, in 2015, 2016, 2017, 2018. There is no evidence that they signed a new lease in 2019, after the parties had filed their applications with the Board. Nevertheless, the Tenants continued to live in the rental unit throughout 2019, until the end of June 2020.
9. The Landlords' position is that there were new leases every year, and that Tenants only had a tenancy during the months specifically listed in the lease. They allege that the Tenants had no right to access, nor to remain in the rental unit during the summer months that were not included in the written lease. They also allege that the Tenants owe arrears of rent for the summer months in which they did access or stay in the rental unit.
10. The Tenants allege that the substance of the rental agreement was that it was an ongoing rental agreement from 2014 until 2020. They allege that the accepted practice between the parties was that the Tenants would live in the rental unit for 10 months in the year, and that they would only occasionally access or stay in the rental unit during July and August of each year. They allege that, as they were rarely staying in the rental unit during the summer months, both parties understood and accepted that the Tenants did not pay rent during July and August, and the monthly rent was either \$4,500.00 per month (or \$5,500.00 per month, depending on which year is being discussed) during the months they were in residence. They never paid any rent in July or August. They allege that they continued to pay utilities and maintenance of the yard during the summer, and all their

belongings remained in the rental unit, and this proved that the tenancy continued throughout July and August.

11. There is no dispute that there was a tenancy. However, I am bound by the *Residential Tenancies Act, 2006* (the 'Act') to find a tenancy that is lawful under the Act. Parties are not permitted to contract out of the Act, and there are various ways that the position of each party, stated above, is a way of contracting out of the Act.
12. Pursuant to section 2 of the Act, the definition of "tenant" includes a person who pays rent in return for the right to occupy a rental unit. That is, there has to be a monthly rental amount owing from the Tenants to the Landlords. There is no such thing as a "rent-free" month (see below).
13. Section 37(1) of the Act provides that a tenancy may be terminated only in accordance with this Act.
14. Subsection 38(1) of the Act provides that when a tenancy agreement for a fixed term ends, if it has not been renewed or terminated, it is deemed to have been renewed as a monthly tenancy agreement containing the same terms and conditions that are in the expired tenancy agreement. The section also explicitly states that deemed tenancy agreements must follow the Act's provisions for increases in rent.
15. Taking account of the definition of "Tenant", as well as subsections 37(1) and 38(1) of the Act in order to find a lawful tenancy under the Act, I find that there are two possibilities. Either the agreement between the parties was a) that this was a tenancy that commenced in 2014, and continued on a month to month basis after the termination of the first lease in 2015, with a new lease for September 1, 2017, that then continued on a month to month basis when it expired, or b) that the tenancy continued on a month to month basis after the first term ended in June in 2015, and that the parties concluded a new lease in September of each year. It is undisputed that the tenancy was never lawfully terminated pursuant to the Act, and therefore both subsections 37(1) and 38(1) of the Act must apply. Between 2014 and 2020, the tenancy was never terminated by either a lawful notice of termination, abandonment, or an agreement by the parties to terminate the tenancy.
16. It is clear that at least until 2018, the parties agreed that no rent would be paid in July and August. Pursuant to the Act, Tenants are obligated to pay the rent every month. However, Landlords are not obligated to insist that rent is paid every month. A landlord may choose to waive the rent in any given month. This "rent holiday" was agreed upon by both sides, most importantly by the Landlords, until the Autumn of 2018, and certainly by December 2018, when the Landlords served the Tenants an N4 Notice of Termination.
17. Therefore, it is before me to decide whether this was an ongoing tenancy agreement, commencing in 2014, that continued on a month-to-month basis after the expiry of the written agreement in June 2015, with a new lease in September 2017, that continued until 2020. If it was not, then option (b) of paragraph 15, above, applies., i.e. the parties concluded a new agreement each year when they signed a new lease. In either case, I have to determine the nature of the "rent holiday" agreed to by the parties in 2015, 2016, and 2017, for which agreement was withdrawn by the Landlords in 2018 and 2019.

18. The parties believed they were signing a new lease each year. However, merely because they believed that was what they were doing does not mean it was lawful under the Act. Both parties admitted ignorance of the Act. Parties cannot agree new terms of a lease that is unlawful. For example, the Landlords believed that the parties could mutually agree to raise the rent. The Tenants were also unaware that such an agreement was in contravention of sections 110 and 116 of the Act. The evidence is clear that the parties were, for many years, ignorant of their rights and obligations.
19. The leases signed by the parties over the years contain many unlawful terms, such as obligating the Tenants to take care of grass cutting and snow removal, obligating the Tenants to pay for a certain amount of maintenance repairs etc. Merely because the parties agreed to these terms does not make them lawful.
20. Parties may choose to sign a new lease for any number of reasons that are lawful. In this case, both parties believed they were getting a greater security of tenure. They were mistaken in this belief. However, in 2017, the parties agreed to lower the monthly rent from \$5,500.00 to \$4,500.00. There is no provision of the Act precluding parties from agreeing to a decrease in rent.
21. The Landlords allege that they lowered the rent because they were carrying out major work on the property in 2017. The evidence does not support their allegation. The Tenants' testimony, and written texts between the parties prove, on a balance of probabilities, that the Landlords agreed to lower the rent to \$4,500.00 per month in 2017 because the Tenants were considering moving out, and the Landlords did not wish to lose them as Tenants.
22. In any case, it does not matter why the Landlords agreed to lower the rent, as it is undisputed that the parties mutually agreed to it. The parties signed a new lease commencing September 1, 2017, to execute their agreement.
23. All other terms of the lease originally entered into in 2014 did not change over the years. The lease agreement was always silent about the agreement for the months of July and August.
24. Consequently, I find that there was, effectively, no new lease from August 15, 2014, when the tenancy was established, until September 1, 2017, when the parties lowered the rent. The lease agreement from 2014 continued on a month to month basis after it expired on June 30, 2015.
25. Similarly, the only difference between the lease commenced on September 1, 2017, and that entered into on September 1, 2018, was that the parties agreed to increase the rent back to \$5,500.00. The Landlords cannot increase the rent unlawfully in the guise of creating a new lease that is exactly the same as the previous lease. Consequently, I find that the lease entered into commencing September 1, 2018, is not a new lease, and the Landlords unlawfully increased the rent to \$5,500.00 in September, 2018.

26. From September 1, 2017, until the end of the tenancy, the monthly rent remained \$4,500.00.
27. I find that the new lease agreement commencing September 1, 2017, continued until the end of the tenancy. The monthly rent was \$4,500.00 until the Tenants vacated on June 30, 2020.

Landlords' L1 Application, Tenants' T1 Application, and the Rent Holiday:

28. The Landlords claim arrears of rent. The Tenants claim that the Landlord unlawfully withheld the last month's rent deposit and all interest owed on the last month's rent deposit, as well as \$500.00 that was overpaid in rent.
29. In *Gonte Construction Limited v. Tenants of 90 Eastdale Ave. and 2 Secord Ave., 2012 ONSC 6733 (Canlii)*, ('Gonte') the Divisional Court upheld a Board ruling that accepted the principle of a rent holiday.
30. In other words, the Tenants owe the Landlords the monthly rent each and every month, but the Landlords may choose to waive the rent in any given month. Merely because the Landlords choose to waive the rent does not obligate them to do so.
31. I find that this waiver of rent in July and August is what the parties agreed to from 2014 until December, 2018, when the Landlords served the Tenants with an N4 Notice of Termination for rent arrears.
32. All the texts, testimony and established practice between the parties prove, on a balance of probabilities, that from the commencement of the tenancy until August 31, 2018, when the relationship between the parties soured, the parties agreed that the Tenants would not be in residence in the rental unit during July and August; that the Tenants had access to the rental unit during the summer months; the Tenants continued to pay for lawn maintenance and utilities during July and August; and most important, that the Landlords would waive the rent during July and August.
33. There are a series of texts, commencing the end of August, 2018, that prove, on a balance of probabilities, that both parties were increasingly unhappy with the arrangement. By this time, the Tenants had sought legal advice about the increased rent, and the Landlords attempted to limit access for the Tenants to the rental unit. The Landlords also attempted to extract payment for damages from the Tenants at that time.
34. At the end of August, 2018, the Landlords sent a text to the Tenants that states, "Please READ your lease. Nowhere does it say you can stay for the months of July and August rent free. Nowhere does it say you can leave your belongings in the house after the lease expired. I tried many times to negotiate with Bev for at least an 11 month lease. She always refused."
35. When the Tenants were still away for the summer and planning to return on August 30, 2018, the Landlords asked for \$4,884.00 from the Tenants for damages they alleged had

been caused by the Tenants. If they did not pay, the Landlords said they were going to refuse entry to the rental unit. The Tenants replied “sounds like extortion to me.”

36. In a text on Sunday, September 2, 2018, the Landlords informed the Tenants that the property was locked “for safety and security,” and they denied them access to the rental unit. The Tenants’ evidence was that they eventually obtained access to the property later that day, September 2, 2018.
37. The relationship between the parties deteriorated and the Landlords eventually served the Tenants in December, 2018, with an N4 Notice of Termination for arrears of rent for July and August, 2018.
38. The Tenants did not pay rent in July and August, 2019, either. The Landlords are now claiming arrears of rent for July and August, 2018, as well as July and August, 2019.
39. Based on all the testimonial evidence, texts and actions of the parties from the beginning of the tenancy, I find that the tenancy agreement included an understanding that the Landlords would waive the rent for July and August when the Tenants were rarely in residence.
40. Based on *Gonte*, cited above, the Landlords were never obliged to waive the rent. However, the evidence proves, on a balance of probabilities, that the Landlords waived the rent for July and August until the beginning of September, 2018. At that point, it was clear to the Tenants that the Landlords were no longer waiving July and August rent. The Landlords could not claim rent for July and August, 2018, ex post facto, at the beginning of September, 2018, just because relations between the parties had deteriorated. However, I find that the Tenants were well aware by September, 2018, and certainly by the time they received the N4 Notice of Termination in December, 2018, that the Landlords were no longer waiving the rent for July and August.
41. Consequently, I find that the Tenants owe \$9,000.00 arrears of rent to the Landlords for the months of July and August, 2019.
42. The Tenants unlawfully paid \$5,500.00 for the months of September, 2018, to January, 2019, thereby overpaying \$5,000.00 in rent. They paid \$4,500.00 per month for the rest of the tenancy, except for July and August, 2019, and June, 2020, when they paid nothing.
43. The Tenants did not pay rent in the month of June, 2020. They allege that they applied the \$5,000.00 over payment to the last month of their tenancy, and since the rent was \$4,500.00, the Tenants say that the Landlords still owe them \$500.00 from the \$5,000.00 overpayment of rent they paid from September, 2018, to January, 2019.
44. The parties dispute whether a last month’s rent deposit was paid. The Landlords allege that the Tenants never paid a last month’s rent deposit.
45. However, it is clear from the original lease agreement of 2014, that a last month’s rent deposit was paid to Royal LePage, the entity that organized the lease, in 2014. The

Landlords did not apply the last month's rent deposit to the last month's rent, nor have they returned it to the Tenants.

46. It is undisputed that no interest was ever paid on the last month's rent deposit.
47. Consequently, I find that the Tenants owe the Landlords \$9,000.00 less the \$5,500.00 last month's rent deposit, less the \$500.00 overpayment of rent, less the interest due on the last month's rent deposit (\$352.00).
48. The Tenants owe the Landlords a total of \$2,648.00.
49. Since both parties partially prevailed in their applications, neither party will be liable to pay the other their cost of filing their L1 or T1 applications.

Tenants' T2 Application:

50. The Tenants allege that the Landlords served them with an N12 Notice of Termination in June 2019, in retaliation for filing their T2 application. They also claim that the Landlord harassed, threatened or obstructed their reasonable enjoyment of the rental unit by threatening to deny them access to the rental unit at the end of August, 2018, and by a number of illegal entries carried out by the Landlords in the Autumn of 2018.
51. The text exchanges with regard to the Landlords' denial of access to the rental unit at the end of August, 2018, are referred to above. As mentioned above, the Landlords eventually permitted entry to the Tenants on September 2, 2018.
52. The Tenant, B. Smith (BS), said that the Landlord, E. Di Pierdomenico (ED), came to the house without notice and video recorded on the Tenants' lawn on September 16, 2018. This incident is supported by a text message from the Tenants to the Landlords, dated September 16, 2018, in which they state that their children observed ED that day.
53. BS said that the incident on September 16, 2018, as well as the refusal to provide access to the rental unit between August 30, 2018, and September 2, 2018, precipitated the letter, dated September 25, 2018, from the Tenants' legal representative to the Landlords informing the Landlords of the illegality of their actions. Despite the letter, BS said that there were further interferences with their reasonable enjoyment, and further illegal entries.
54. BS said there was another altercation on October 18, 2018, when ED sat in her car on the driveway of the rental unit, and then followed BS when she left the house. BS said that the incident culminated with ED blocking BS in a one way street. BS said that she reported the incident to the police.
55. BS said that there were further illegal entries on November 10, 2018, and on November 11, 2018. She presented video evidence of ED coming to the property unannounced.

56. BS said that in January, 2019, the Tenants asked for all the post-dated cheques for rent in the amount of \$5,500.00 be returned to the Tenants. The Landlords refused to return the cheques, telling the Tenants that they would destroy them.
57. The Tenants are seeking an abatement of \$7,000.00 for the refusal of access, threats and interference, and the illegal entries.
58. The Landlord, ED, said that she never illegally entered the rental unit.
59. ED said that any time she entered the property she called, or texted, or posted a notice on the door.
60. ED said that on November 10, 2018, she went to the property and rang the doorbell, but there was no answer. She said that she then posted a notice on the door, thereby providing 24 hour notice of entry. ED did not provide any documentary evidence of this note, and said the "wind must have blown it away." She said that she had to change the furnace filter, so she entered the house to do that on November 11, 2018.
61. ED said that on September 16, 2018, she asked arbourists working on a neighbouring property to cut a rotting tree trunk on the front lawn of the rental unit.
62. I find that the documentary evidence and testimony prove, on a balance of probabilities, that the Landlords denied the Tenants access to their home between August 30, 2018, when the Tenants sought to return from their summer residence, and September 2, 2019.
63. I find that BS' evidence about the alleged illegal entry on September 16, 2018, is vague. The text message sent to the Landlords indicates that BS did not witness any illegal entry herself, but it was reported through her children. ED's evidence that she was seeking to have work done on a rotting tree trunk is credible, based on the Tenants' own account from their children. I find that there was no illegal entry nor was there substantial interference with reasonable enjoyment on September 16, 2018.
64. BS provided uncontested evidence of the incident of October 18, 2018. This incident commenced on the residential complex. If a Landlord waits on the residential complex until a Tenant leaves the rental unit, follows and harasses them, I find that could constitute substantial interference with reasonable enjoyment of the rental unit, or it could reasonably be perceived as harassment, obstruction or even threatening. BS testified that she felt frightened and threatened, and that it disturbed her sufficiently to call the police and report the incident.
65. Consequently, I find that the incident of October 18, 2018, was a substantial interference with the Tenants' reasonable enjoyment of the rental unit or the residential complex.
66. The alleged illegal entry on November 10, 2018, was not an illegal entry. The Tenants' evidence showed ED coming to the door unannounced, but she never entered.
67. However, on November 11, 2018, ED admits that she entered. ED said that she provided notice of entry, but she had no documentary evidence.

68. I find that the parties' relationship had broken down by November, 2018, and the Landlords were upset and angry that the Tenants had filed their applications with the Board. The Landlords had demonstrated in August and September, 2018, that they believed they could stand on their rights, and in their ignorance of the Act, they believed they could do whatever they wanted with the rental unit. Consequently, I find that it is more probable than not that the Landlords failed to give 24 hour notice of entry on November 11, 2018. If ED was there to change the furnace filter, as she claimed, this does not constitute a case of emergency, pursuant to subsection 26(1)(a), and the entry was not with the consent of the Tenants. Therefore, the entry on November 11, 2018, was an illegal entry.
69. This illegal entry took place after the Tenants had already put the Landlords on notice about their unlawful actions through their legal representative's letter of September, 2018, and after they should have known that they were interfering with the Tenants' rights.
70. Therefore, I find that for the denial of access to the rental unit for three days at the end of August, 2018, which was very upsetting and frightening for the Tenants, for the interference with Tenants' reasonable enjoyment of the rental unit in October, 2018, that led to a police report, and the illegal entry on November 11, 2018, the Tenants should obtain a rent abatement of \$2,648.00.

It is ordered that:

1. The tenancy terminated on June 30, 2020, when the Tenants vacated the rental unit.
2. The residual \$2,648.00 owed by the Tenants to the Landlords when the Landlords' L1 application is offset against the Tenants' T1 application, is cancelled by the \$2,648.00 owed by the Tenants to the Landlords for the Tenants' T2 application.
3. The Landlords owe the Tenants their \$50.00 cost of filing their T2 application.
4. If the Landlords do not pay the Tenants the \$50.00 on or before June 18, 2021, the Landlords will start to owe interest. This will be simple interest calculated from June 19, 2021 at 2.00% annually on the balance outstanding.

June 7, 2021
Date Issued


Nancy Morris
Member, Landlord and Tenant Board

Toronto North-RO
47 Sheppard Avenue East, Suite 700, 7th Floor
Toronto ON M2N5X5

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