Order under Subsection 135
Residential Tenancies Act, 2006

Citation: Cornacchia v Sandy, 2024 ONLTB 14494
Date: 2024-03-05
File Number: LTB-T-001868-23; LTB-T-010433-23

In the matter of: 20 BELL ST
BARRIE ON L4N0J2

Between: Matthew Cornacchia — Tenants
Jayne Gillett

And

Sherry-Ann Sandy — Landlord

Matthew Cornacchia and Jayne Gillett (the 'Tenants') applied for an order determining that Sherry-Ann Sandy (the 'Landlord') collected or retained money illegally (T1 application) and gave a notice of termination in bad faith (T5 application).

This application was heard by videoconference on January 26, 2024.

The Landlord, the Landlord's Representative Yuvraj Bhullar, and the Tenants attended the hearing.

Determinations:

The Adjournment Request

1. At the hearing, the Landlord's Representative requested an adjournment because they believed there was only a T1 application and did not realize there was also a T5 application.

2. I denied the adjournment request because the procedural history confirms the Landlord had adequate notice and should have been aware of the T5 application.

3. An earlier hearing for LTB-T-001868-23 was scheduled on May 3, 2023 and was adjourned with an interim order issued. The adjournment sheet for that hearing states "[the] parties consent to have T1 and T5 heard together and rescheduled on a new date. LTB-T-001868-23 and LTB-T-010433-23 to be scheduled on the same date and hearing room." The corresponding interim order which was sent to the Landlord on May 11, 2023 states "the Tenants consented to an adjournment [requested by the Landlord], if their two applications can be heard together on a new date . . . I find it is appropriate to hear the two applications together given that the same evidence will be relied upon for both applications and the issues are related . . . The hearing [of LTB-T-001868-23] is adjourned to a date to

be scheduled by the Board along with LTB-T-010433-23. A new Notice of hearing shall be issued for both applications." And another notice of hearing for the T5 application was emailed to the Landlord on November 29, 2023 for this hearing date.

4. It is unequivocally clear that the Landlord had notice of the T5 application. It was the basis for the consent to the adjournment at the prior hearing which she attended, she received an interim order directing a combined hearing of both applications, and then a notice of hearing. I further find this adjournment request constitutes an abuse of the Board's process as it was the basis for the consent to the prior adjournment. I therefore denied the adjournment request and expected the Landlord to proceed with both applications on this hearing date.

5. The Landlord was initially not present at the hearing. After denying the adjournment request, I asked the Landlord's Representative to call their client and have them attend today's hearing to respond to the T5 application. The Landlord informed her Representative who informed me that she was going to attend his office and to give her some time to do so. I therefore held the matter down to provide the Landlord an adequate opportunity to participate and respond to the T5 application.

T1 application

6. As explained below, the Tenants proved the allegations contained in the application on a balance of probabilities. Therefore, the Landlord must pay the Tenants one month's compensation for the N12 notice that they served on May 30, 2022.

7. On May 30, 2022, the Landlord served the Tenants an N12 notice of termination pursuant to s. 48(1) of the Act for their own use. The termination date is August 31, 2022.

8. Sections 48.1 and 55.1 of the Act state:

> **48.1** A landlord shall compensate a tenant in an amount equal to one month's rent or offer the tenant another rental unit acceptable to the tenant if the landlord gives the tenant a notice of termination of the tenancy under section 48.
>
> **55.1** If the landlord is required to compensate a tenant under section 48.1, 49.1, 52, 54 or 55, the landlord shall compensate the tenant no later than on the termination date specified in the notice of termination of the tenancy given by the landlord under section 48, 49 or 50.

9. The monthly rent was $2,675.00.

10. At the hearing, the Landlord acknowledged that she did not pay the Tenants the N12 compensation. She testified that the payment was not made because she realized that she was not provided with the Tenants' last month rent deposit from the former landlord who they purchased the property from.

11. This is not a valid reason to not pay the Tenants the required compensation for the N12 notice they served for personal use and is instead an issue they have with the former

property owner. Furthermore, s. 106(10) of the Act requires the last month's rent deposit to be applied to the last rental period and it cannot be applied to offset the N12 compensation.

12. As a result, the Tenants are entitled to one month's compensation for the N12 notice that the Landlord served them resulting in them vacating the rental unit.

T5 application

13. As explained below, the Tenants proved the allegations contained in the application on a balance of probabilities. Therefore, the Landlord must compensate the Tenants for 3 months rent and moving expenses.

14. Subsection 57(1)(a) of the Act requires the Tenants to prove each of the following on a balance of probabilities:

    1. The Landlords gave the Tenants an N12 notice of termination under section 48 of the Act;
    2. The Tenants vacated the rental unit as a result of the N12 notice of termination;
    3. No person referred to in subsection 48(1) of the Act occupied the rental unit within a reasonable time after the Tenants vacated; and
    4. The Landlords served the N12 notice of termination in bad faith.

15. The Tenants proved all of the requirements in subsection 57(1)(a).

16. As noted, on May 30, 2022, the Landlord served the Tenants with an N12 notice of termination for personal use pursuant to s. 48 of the Act. The Tenants vacated the rental unit as a result of the N12 Notice on August 31, 2022. At the hearing, the Landlord testified that the Tenants intended to vacate the rental unit in any event and had already purchased their home. However, there is no evidence submitted to support that allegation and the Tenants further testified that they only started looking for a home after being served the N12 notice (after looking for rental units first) and that their purchase and sale agreement was signed after being served. The Tenants also submitted text messages to the Landlord sent on September 8, 2022 stating:

    > "Hey Sherry, Are you planning on give us the money that you owe us? As per the N12 you served us? You agreed over the phone to do cash for keys and we vacated your house on Aug 31 like you asked us to. We would still like to give you your keys back."
    >
    > [emphasis added]

17. The Landlord never responded to this text, and it is also telling that the Tenants are intent on receiving the N12 compensation throughout multiple text messages to the Landlord after August 31, 2022 because if they had decided to vacate irrespective of the N12 notice, it is unlikely that they would repeatedly be asking the Landlord for the required compensation as they did and also mention an agreement for cash for keys which is also unrelated to any property purchase.

18. On a balance of probabilities, I find the Tenants vacated the rental unit as a result of the N12 notice of termination.

19. The Landlord did not occupy the rental unit within a reasonable time after the Tenants vacated and never moved into the rental unit at all. The Landlord and Tenants both agreed that the Landlord had rented the rental unit to some students several months after the Tenants had vacated rather than personally occupying it in accordance with the N12 notice.

20. With respect to the remaining issue of whether the N12 Notice was served in bad faith, the Tenants submitted multiple rental listings of the rental unit which were active from October 12, 2022 to January 2023, and commenced six weeks after the Tenants vacated the rental unit on August 31, 2022. The Landlord did not dispute that they posted these rental listings after the Tenants had vacated.

21. Accordingly, s. 57(5)(a) of the Act applies and "it is presumed, unless the contrary is proven on a balance of probabilities, that [the] landlord gave a notice of termination under section 48 in bad faith." This presumption would also apply pursuant to s. 57(5)(b) of the Act as the Tenants also submitted that the Landlord entered into a tenancy agreement with other tenants (a group of students) which the Landlord did not dispute.

22. Therefore, the Landlord has the onus of proving on a balance of probabilities that they did not serve the N12 notice in bad faith. The Landlord did not fulfill this burden of proof.

23. The Landlord testified that she purchased the property in May 2022 and intended to move in the day of the closing but realized that the former landlord did not serve the Tenants an N12 notice of termination for purchaser's use pursuant to s. 49 of the Act. The Landlord never specified whether serving an N12 notice under s. 49 of the Act was a term of their agreement of purchase and sale with the former landlord and whether it was reasonable for them to expect that N12 to have been served. In any event, this would not address whether the N12 notice that they served was done in bad faith. After discussing with her real estate lawyer, the Landlord tried giving the Tenants an N11 agreement to terminate the tenancy but the Tenants refused to sign it. At that point, the Landlord had nowhere to live "she was staying with cousins and ended up renting a place of her own." The Landlord did not move in because "I already had to sign the lease where I was . . . First it was month to month and then when Jayne said will put fight [for N11] I signed lease."

24. The Landlord did not submit the lease agreement that they allegedly had to sign and is the entire basis for their defence for their failure to move in in accordance with the N12 notice.

25. In TNL-86355-16, Member Solomon addressed similar circumstances:

> 16. In Parris v. Laidley, 2012 ONCA 755, the Court of Appeal for Ontario stated that "drawing adverse inferences from failure to produce evidence is discretionary" and "the inference should not be drawn unless it is warranted in all the circumstances". This was a contentious case and both the intention of the Landlord's daughter and the Landlord's credibility were central issues. Therefore, I find it surprising that the Landlord did not call her daughter to give evidence to support her application, especially since the daughter was readily available to participate and she would have provided the best evidence of her intention to occupy the unit. The Landlord's representative argued that the Tenant knew who the daughter was and could have called the daughter as a witness. However, the Landlord has the burden of proving her case, and I find it appropriate to draw an

> adverse inference from her failure to call a relevant, important and readily available witness to support her application and her version of the events.
>
> [emphasis added]

26. Similarly, here the Landlord's intention and credibility are both central issues. The lease agreement which is the entire basis for their defence is relevant, important and readily available evidence. At the hearing, I asked the Landlord why she did not submit the lease agreement and her Representative responded "she doesn't have the lease" and the Landlord responded "when I came here this morning I was at the doctor's office I have two newborns sick" which does not address the question and why this was not submitted before the hearing which was already adjourned 7 months ago. Either way, I find it is appropriate to draw an adverse inference for the Landlord's failure to produce the lease agreement that she was allegedly required to sign after renting month to month.

27. This is especially true as the Landlord submitted other irrelevant supporting documentation for their current address, including a "GeoWarehouse Property Report" which described the lot, address, sales history, and other irrelevant information and an "RBC line of credit statement". It is inexplicable why the Landlord would not submit the lease agreement for the property they were allegedly required to rent for a fixed term during the time period at issue but yet to also submit supporting documentation for the subsequent property for a later time period and is only marginally related to their actual defence.

28. It is also appropriate to draw an adverse inference for the Landlord's failure to call any witness to corroborate their story such as the cousin they were living with or the landlord who they rented from and required her to sign a one year lease "against her will". Both could have established the Landlord's version of events.

29. The Landlord's story also does not make sense. The Landlord alleges they were "staying with cousin and ended up renting place of my own." That place they rented was allegedly month to month until they were forced to sign a fixed term one year lease which was coincidentally required the same month after they served the N12 notice (June 2022). It is unclear how long the Landlord was staying with their cousin and why they could not stay with them any longer. It is unclear how long they were renting month to month from another landlord before allegedly being required to sign a one year lease. Was the Landlord staying with their cousin or another landlord? The Landlord was also allegedly month to month with the other landlord and after they had left their cousin's place, but yet this all had to transpire immediately after the N12 notice was served from May to June 2022. It is also unclear whether the Landlord signed this lease agreement before the termination date in their N12 notice and knew they definitely did not intend to reside in the rental unit before the Tenants vacated. The Ontario Court of Appeal recently confirmed in *Elkins v Van Wissen*, 2023 ONCA 789 at paras 41-73 that the landlord's good faith intention includes events after an N12 notice was served, and it is unclear whether that good faith intention persists in this case (or was ever present) as the Landlord did not submit the lease agreement which may have been signed before the N12 was even served on May 30, 2022 or after that date but before the Tenants vacated the rental unit on August 31, 2022.

30. I also find the Landlord unintentionally revealed that she was not actually required to sign a one year lease throughout the course of her testimony. During cross-examination, the Tenant asked the Landlord "when did you decide to go from month to month?" The Landlord answered "around time Jayne said will not sign document, so next month told the guy I will take it for a year." This does not suggest the Landlord was required to sign a one year lease, but rather that she decided to after the Tenants did not sign the N11 notice. The Landlord "told the guy [she] will take it for a year." There is no mention of the guy telling the Landlord to sign a fixed term lease or to leave as was earlier suggested in examination-in-chief. The Tenant's next question was "why couldn't you continue month to month?" The Landlord answered: "already told him I was there for a few months and then when no other choice decided to make choice." It is unequivocally clear from this testimony that it was the Landlord's choice to sign a one-year lease agreement after serving the N12 notice, rather than being required to as initially suggested.

31. When asked why did you not move in to the unit by November 2022 or afterwards (3 months after Tenants vacated), the Landlord answered: "because my whole life changed – my circumstances changed." And the Landlord's Representative added: "she has two more babies now and needed to be taken to the hospital, SickKids hospital, in Toronto, easier for her to have access to Toronto where now on GO Train, easier." While I accept that the Landlord's current address is much closer to SickKids hospital than the rental unit is, the Landlord again submitted no supporting documentation of health circumstances to establish her explanation for not moving into the unit as of the hearing date.

32. Considering all the circumstances, the Landlord has not rebutted the presumption that their N12 notice was served in bad faith given the rental unit listings and tenancy agreement signed with other tenants. The Landlord did not produce the lease agreement, their cousin, their former landlord, and their first story is also unclear regarding the details of which months they were with their cousin, month to month, and when they were allegedly required to sign a one year lease with their former landlord, which all had to transpire around May to June 2022. No correspondence of texts or emails of a requirement to sign a one-year lease was submitted. The Landlord's first story was also not sustained in cross-examination as she suggested twice that it was actually her choice to sign the one-year lease rather than there being any requirement to do so. Had the lease been submitted, it probably would have revealed that it was signed before the Tenants vacated the rental unit, contrary to *Elkins v Van Wissen* (2023) and the Landlord's ongoing intention of good faith. The Landlord also failed to submit any supporting documentation for their second story and a need to now be close to SickKids hospital.

Remedies

33. At the hearing, the Tenants claimed much lower remedies than they did in their application as they did not understand the exact process and wanted to lower the figures and be respectful of the process. The Tenants claimed the difference in rent for one year which would be $6,707.04 and utilities of $707.04. The Tenants also requested the Landlord pay an administrative fine to the Board, moving expenses of $2,920.99, and pre and post judgment interest.

34. I am unable to award the Tenants the difference in rent for one year as the Tenants are no longer renting and have instead purchased a home and their figures are based on their

mortgage payments which includes interest. This is unfair to the Landlord as the Tenants were not *required* to purchase a home as a result of the N12 notice they were served. While the Tenants submitted they could not afford other rentals in the market at the time, purchasing a home is even more expensive than renting one is and includes interest payments. The Tenants were not required to purchase a home due to the N12 notice being served and voluntarily chose this more expensive living arrangement. It is unclear what the difference in rent would have been had they continued to rent.

35. The Tenants did not submit an invoice for their moving expenses, but instead submitted a proposed quote for their move which amounted to $2,802.40 and a uhaul rental confirmation of $118.59. I am not satisfied with the proposed quote submitted and it is unclear why the Tenants would not submit the actual invoice if they ultimately chose this company. As a result, I assess the reasonable moving expenses to be $750.00 and add to that the uhaul rental of $118.59 for a total $868.59.

36. While I am not awarding the Tenants the difference in rent for one year, given my finding that the Landlord served the Tenants an N12 notice in bad faith, I am awarding the Tenants general and compensatory damages equivalent to 3 months rent ($8,025.00). This is a commensurate award with the impact the Tenants experienced from being forced to uproot their lives under false pretences and the benefit the Landlord may have received with any increased rent.

37. Given the above remedies, I am not convinced that an administrative fine is *required* to deter the Landlord from engaging in similar activity in the future. While I have reservations of whether this Landlord will comply with the Act and not engage in similar activity in the future, after a careful consideration and a close decision, I have decided to not order any administrative fine and any subsequent application against this Landlord may consider this decision.

It is ordered that:

1. The total amount the Landlord shall pay the Tenants is $10,806.00. This amount represents:
    - $2,675.00 for the N12 compensation owing.
    - $8,025.00 general and compensatory damages for the N12 served in bad faith.
    - $106.00 for the cost of filing both applications.
2. The Landlord shall pay the Tenants the full amount owing by March 15, 2024.
3. If the Landlord does not pay the Tenants the full amount owing by March 15, 2024, the Landlord will owe interest. This will be simple interest calculated from March 16, 2024 at 7.00% annually on the balance outstanding.

March 5, 2024
Date Issued

Elan Shemtov
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.