



Order under Section 57 Residential Tenancies Act, 2006

Citation: Sanchez v Xu, 2024 ONLTB 50494

Date: 2024-07-09

File Number: LTB-T-048832-22

In the matter of: 7205, 88 Harbour Street
Toronto Ontario M5J0C3

Between: Saul Sanchez

And

Zhanhua Xu
Del Condominium Rentals

And

Joey Ka Yan Lam

I hereby certify this is a
true copy of an Order dated
JULY 9, 2024
Jane Dean
Landlord and Tenant Board

Tenant

Vendor
Landlords

Purchaser

2024 ONLTB 50494 (CanLII)

Saul Sanchez (the 'Tenant') applied for an order determining that Zhanhua Xu (the 'Vendor Landlord'), and Del Condominium Rentals, (the 'Landlord') and Joey Ka Yan Lam (the 'Purchaser') gave a notice of termination in bad faith.

The application was heard by videoconference on June 6, 2024.

The Purchaser, Joey Kan Yan Lam, their support, Ivan Wu, and the Legal Representative of Del Condominium Rentals, Edwin Sadasivam, and the Tenant attended the hearing.

As of 1:37 p.m., Vendor Landlord Zhanhua Xu, was not present or represented at the hearing although properly served with notice of this hearing by the LTB. There was no record of a request to adjourn the hearing. As a result, the hearing proceeded without the first-named Vendor Landlord's evidence.

Determinations:

Preliminary Matter

1. The Tenant sought to amend his T5 application to include the purchaser as a party to the application, and to remove Del Condominium Rentals ('Del') from the application. The Representative for Del explained that a previous adjournment was granted on this basis.

2. A request to amend an application was uploaded to the Tribunals Ontario Portal on June 15, 2023. This request to amend was to remove Del from the claim. The amended application was served on the parties and the Board by the Tenant. The Purchaser, who was in attendance, did not object to having been named as a party to the matter.
3. The amended application was granted as there was no prejudice to the parties for doing so. The Representative for Del explained that the company was a property manager at the building where the rental unit was located but had played no part in the eviction of the Tenant and had not been involved with the sale of the property from the Vendor Landlord to the Purchaser. The Tenant confirmed this during the hearing.
4. The Representative for Del told the Board that they had forwarded the Notice of Hearing to the Vendor Landlord. The Tenant confirmed that he had spoken with the Vendor Landlord about the hearing, and it was the Vendor Landlord's position that this was not his legal responsibility, but that of the Purchaser. Therefore, the hearing proceeded with only the Tenant and Purchaser.
5. As explained below, the Tenant proved the allegations contained in the application on a balance of probabilities. Therefore, the Vendor Landlord and the Purchaser must pay to the Tenant \$12,216.00.

BACKGROUND

6. The tenancy began between the first-named Vendor Landlord on June 1, 2018. The unit is a condominium unit, and the monthly rent was \$1,900.00 at the time the tenancy terminated.
7. The Vendor Landlord was represented by a realtor named "Joyce" during the sale of the property. The Purchaser was represented by "Daniel."
8. On April 21, 2021, the Tenant was served with an N12 Notice of Termination via e-mail by Joyce indicating the Vendor Landlord had entered into an Agreement of Purchase and Sale and that the Purchaser intended to move into the rental unit. A copy of the notice was submitted into evidence by the Tenant and was signed by the Vendor Landlord. The termination date indicated on the Notice was June 30, 2021.
9. The Tenant gave notice to terminate his tenancy on May 17, 2021, pursuant to s. 49(4) of the Act which permits a tenant to terminate a tenancy earlier than the date specified in the notice.
10. The property transferred ownership from the Vendor Landlord to the Purchaser on July 8, 2021. On July 23, 2021, the Tenant found the rental unit advertised on the Multiple Listing Service (the 'MLS') for a rate of \$2,500.00 per month. The Purchaser did not dispute that she did not move into the rental unit and that she re-listed the rental unit in July 2021 at a higher rental rate.

11. I find that the Tenant has proven the first three elements of the test as found in subsection 57(1)(b) of the *Residential Tenancies Act, 2006* (the 'Act') requires the Tenant to prove each of the following on a balance of probabilities:

- The Vendor Landlord gave the Tenant an N12 notice of termination under section 49 of the Act;
- The Tenant vacated the rental unit as a result of the N12 notice of termination;
- No person referred to in subsection 49(1) or 49(2) of the Act occupied the rental unit within a reasonable time after the Tenant vacated; and
- The Vendor Landlord served the N12 notice of termination in bad faith.

12. When the first three elements of the test found in s. 57(1)(b) of the Act are made out, the onus then shifts to the Vendor Landlord and the Purchaser to rebut the presumption that the notice was given in bad faith.

WAS THE NOTICE GIVEN IN GOOD FAITH?

13. The Purchaser testified that she was aware there the rental unit was occupied by the Tenant. However, she explained that she intended to move in, but had changed her mind after the Agreement of Purchase and Sale (the 'APS') was executed by the parties, and that she had told the Vendor Landlord's realtor, Joyce, this in advance and expressed she would be willing to continue the tenancy with the Tenant, but despite asking for information related to the sitting Tenant, she was not provided any information by Joyce.

14. It was the Purchaser's evidence that the APS was signed on April 8, 2021, indicating that the Purchaser wished to have vacant possession. However, on April 10, 2021, the Purchaser was thinking she may not want to move in after all. She told her realtor, Daniel, who reached out to Joyce to let her know.

15. A copy of text messages between Daniel and Joyce were entered into evidence. On April 10, 2021, Joyce writes to Daniel, "...buyer needs to confirm now and then seller knows what to do next. Please advise ASAP." By this I take it to mean that Joyce was aware the APS stated that vacant possession was necessary and was attempting to clarify whether the Purchaser's intentions had changed.

16. In reply, Daniel states "...yes, confirmed, now they want to lease it after closing, they will come to live next year by the way, if the tenant wants to stay, please give us the lease and tenant information, and please tell us whether this tenant owed rent before or not and how this tenant is, thanks."

17. On April 12, 2021, Daniel writes to Joyce, "The buyers called me this morning to tell the tenant to understand the buyers could come to live here anytime in this year or next, but they will give the tenant proper notice once they decide to live in, thanks".

18. Joyce responds to Daniel on April 12, 2021, “Your client needs to talk to the Tenant later on ad [sic] make an agreement between them. Nothing we should do, unless you want to help your client.” On April 18, 2021, Joyce then wrote to Daniel, “the Tenant at 7205-88 Harbour St has decided to move out.” She then goes on to ask whether the purchaser would like to close the deal earlier.
19. The Purchaser testified that she felt she had made adequate efforts to tell the Vendor Landlord that the Tenant could stay on as a Tenant before the N12 was issued and that she ought not to be held legally responsible.

THE LAW

20. Section 202 of the Act states:

202 (1) In making findings on an application, the Board shall ascertain the real substance of all transactions and activities relating to a residential complex or a rental unit and the good faith of the participants and in doing so,

- (a) may disregard the outward form of a transaction or the separate corporate existence of participants; and
- (b) may have regard to the pattern of activities relating to the residential complex or the rental unit.

21. The leading case on the analysis the Board must undertake is found in the case of *Elkins v. Van Wissen*, 2023 ONCA 789, in par. 43 through 45:

[43] On a plain reading of ss. 49(1) and 57(1)(b), the Vendor Landlord’s conduct is linked to the purchaser’s good faith. Section 49(1) permits the Vendor Landlord to, on behalf of the purchaser, give the tenant a termination notice so long as the purchaser, in good faith, requires possession of the rental unit for the purpose of residential occupation. Section 57(1)(b) requires the Board to determine, among other things, whether the Vendor Landlord gave the s. 49 termination notice in bad faith. When ss. 49(1) and 57(1)(b) are read together, it is clear that the object of those provisions is to prevent the sale of a property from being used to unlawfully evict a tenant. Accordingly, the Board must consider all the evidence before it that is relevant to the Vendor Landlord’s bad faith under s. 57(1)(b). It is an error of law for the Board to restrict its consideration to the evidence at the point in time when the Vendor Landlord gives the tenant a s. 49 termination notice. This case makes that point.

[44] As a result of artificially narrowing the assessment of bad faith to when the s. 49 Termination Notice was given, the Board failed to consider that, after the notice was given but before the sale of the Property closed, the Vendor Vendor Landlords and/or their lawyer knew that title to the Property would be taken in the name of Embleton Homes Inc., a corporation. A corporation cannot personally occupy a residence for residential purposes. This information must

surely be relevant to the Board’s determination of the Vendor Vendor Landlords’ bad faith under s. 57(1)(b).

[45] It could be argued that s. 57(1)(b) implicitly limits Board scrutiny to the Vendor Landlord’s knowledge when it gives the s. 49 termination notice. However, such an interpretation runs afoul of s. 202(1) of the RTA. Under s. 202(1), the Board is 2023 ONCA 789 (CanLII) required, when making findings on an application, to ascertain the “real substance Page: 18 of all transactions and activities relating to...a rental unit and the good faith of the participants”. **Limiting the assessment of a Vendor Landlord’s bad faith to that single point in time when the s. 49 termination notice is given precludes the Board from both ascertaining the true substance of the transaction between the Vendor Landlord and the purchaser and conducting a fair assessment of their good faith.**

[Emphasis added].

22. The Court goes on to detail that the Board has jurisdiction to make an order against a purchaser when it finds that a purchaser has acted in bad faith, stating:

[58]...While s 57 (3) sets out specific orders that can be made against a Vendor Landlord who acts in bad faith in giving a s. 49 termination notice, it also empowers the Board to make any order it “considers appropriate.” Thus, if the Board finds that a Vendor Landlord did not act in bad faith but the purchaser did, s 57 (3) gives the Board the power to make appropriate orders against the purchaser. This gives teeth to the good faith requirement on the part of the purchasers in s. 49 (1).

23. That is to say, I must review the intention of the parties both before, during, and following the issuance of the N12 notice.

24. Section.57(3)4 of the Act gives the LTB the power to make an order against the Purchaser. Therefore, remedies can be issued against the purchaser alone, the Vendor Landlord alone or against both depending on who is found to have acted in bad faith.

ANALYSIS

25. The APS was placed into evidence by the Purchaser. It was signed by the Vendor Landlord and Purchaser on April 9, 2021. Page 7 contains a clause which states:

“The Buyer hereby authorizes and directs the Seller, and the Seller agrees, when this Agreement becomes unconditional, to give the Tenant(s) the requisite notices under the Residential Tenancies Act, requiring vacant possession of the property for the use by the Buyer or the Buyer’s immediate family, after closing.”

26. The text messages between Joyce and Daniel referenced above demonstrate that at some point, the Purchaser was reconsidering her decision to move into the property and requiring vacant possession. This was dealt with primarily between the two realtors.
27. Vendor Landlords and purchasers are responsible for the vendors who act on their behalf during a property sales transaction. This can be seen in s. 27(2) of the Act which states that a "...broker or salesperson registered under the *Trust in Real Estate Services Act, 2002*, may enter a rental unit in accordance with written notice given to the tenant at least 24 hours before the time of entry to allow a potential purchaser to view the rental unit."
28. In the case at hand, Joyce, who acted on behalf of the seller, the Vendor Landlord, on April 10, 2021, writes that the buyer needs to advise them of what they wish to do in response to hearing that the Purchaser may have changed her mind about wanting vacant possession. Daniel responds that he was "confirming" that the Purchaser would be leasing the rental unit, asks for the Tenant's information, but then asks whether about the Tenant's payment history and asks, "how this tenant is", which I take to mean he is asking what this tenant is like. Joyce responds, stating there's nothing to be done unless you "...want to help your client." The Board does not understand what Joyce meant by this and she was not called to testify to clarify.
29. For the reasons that follow, the Vendor Landlord and Purchaser both share responsibility for the eviction of this Tenant.

VENDOR LANDLORD'S RESPONSIBILITY

30. The Vendor Landlord employed a realtor who acted on his behalf throughout the sales transaction of the property. Joyce replied on behalf of the Vendor Landlord to the Purchaser's realtor, Daniel. It was Joyce who advised Daniel on April 18, 2021, that the Tenant was planning on moving out on May 18, 2021. It was also Joyce who sent the N12 Notice to the Tenant on the Vendor Landlord's behalf on April 21, 2021. Given that Joyce had been told by Daniel twice that the Purchasers were looking to continue the Tenant's tenancy although the communication suffers from a lack of clarity. Joyce then bears some responsibility for not taking additional steps to ensure the Tenant's lease or contact information were provided to the buyer.
31. The Vendor Landlord knew or ought to have known that the N12 notice should no longer be given to the Tenant, because Daniel had advised Joyce that the Purchaser was looking to lease out the rental unit, requested information about the current Tenant, and that she had decided not to move in despite what had been agreed to on the APS.
32. The Purchaser; however, also bears responsibility for the eviction of the Tenant. The clause in the APS directed the Vendor Landlord/Seller to "...give the Tenant(s) the requisite notices under the Residential Tenancies Act, requiring vacant possession of the property for the use by the Buyer." Given she changed her mind only two days later, she bears some of the responsibility for this change which she took no steps to

have the clause removed as a condition of the sale on the APS. The Purchaser took no further steps to ensure the Tenant was not evicted beyond advising her realtor, Daniel, to tell the Vendor Landlord/seller that she had changed her mind. The Purchaser testified that she did not take further steps because Joyce had advised that the Tenant indicated he would be moving out.

33. In fact, had Joyce and Daniel took adequate steps to ensure what the wishes of the parties were, that being ensuring the buyer actually wanted vacancy, clarifying that the buyer had changed her mind, removing this as a condition from the APS, providing the Tenant's information to the buyer, and not issuing the N12 when there were valid questions about whether the Purchaser was no longer going to move in, the matter would not be in front of the Board.
34. The Tenant's evidence was that he was never advised that the Purchaser had changed her mind about moving in. He received the N12 notice, found a new rental unit quickly, and told the Vendor Landlord that he was exercising his right to move early given that he was issued an N12. Had he known of the Purchaser's intention early on he testified he may have remained in the rental unit.
35. Therefore, when I consider the evidence in light of s. 202 of the Act, I find that both the Vendor Landlord and the Purchaser did not act in good faith when issuing an N12 notice of termination to the Tenant. In my view, the Vendor Landlord, through his realtor, had a responsibility to clarify the Purchaser's intentions **before** issuing an N12 notice; and the Purchaser had a responsibility to ensure the APS she signed was true and correct both on the 8th of April 2021 and the days immediately following. At the very least, the Tenant was entitled to an update as soon as one became available from the Purchaser's agent.

REMEDIES

36. The Tenant requests 12 months' rent abatement which was calculated at \$1,900.00 per month. However, the remedy of rent abatement is only applicable to the time period between the date the N12 notice was issued to the Tenant and the date the Tenant moved out, which I calculate to be 30 days. Rent abatements are intended to compensate tenants for the lack of use and enjoyment of their rental unit. As the Tenant very quickly needed to look for a new rental unit and pack his belongings, and had been a Tenant for several years, I find a one-month abatement of \$1,900.00 is appropriate in the circumstances.
37. The Tenant was able to re-rent a nearby rental unit; however, he testified that his rent increased to \$2,495.00 per month and provided a copy of his new lease into evidence. As the Tenant moved as a direct result of the N12 notice being issued, I find that a rent one-year rent differential is appropriate in the circumstances. Therefore, I find that the Vendor Landlord must pay the Tenant \$7,140.00 for the increased rent that the Tenant has incurred a one-year period beginning June 15, 2021, and ending May 15, 2022.

38. The Tenant submitted an invoice from Miracle Movers dated May 16, 2021, for \$623.00 which showed the moving expenses the Tenant paid. I find this to be a reasonable amount for moving costs. Therefore, I find that the Vendor Landlord must pay the Tenant \$623.00 for the reasonable out-of-pocket moving, storage, and other like expenses that the Tenant has incurred as a result of having to move out of the rental unit.


39. The Tenant seeks general damages of \$2,500.00 for the inconvenience of being uprooted. His tenancy began in 2018 and he was happy and comfortable living in the rental unit. Although he stated that he was fortunate to find another rental unit very close to this one, it was still distressing to find out he never had to leave in the first place. He testified that he would not have left the rental unit had it not been for the N12. Therefore, I find that the Vendor Landlord and Purchaser must pay the Tenant \$2,500.00 for general compensation.

40. This decision contains all the reasons within it. No further reasons will be issued.

It is ordered that:

1. The total amount the Vendor Landlord and Purchaser shall pay the Tenant is \$12,216.00. This amount represents:
 - \$1,900.00 for a rent abatement;
 - \$7,140.00 for increased rent the Tenant has incurred for the one-year period from June 15, 2021, to June 15, 2022;
 - \$623.00 for the reasonable moving, storage and other like expenses that the Tenant has incurred as a result of having to move out of the rental unit;
 - \$2,500.00 for general compensation; and,
 - \$53.00 for the cost of filing the application.
2. The Vendor Landlord shall pay the Tenant the full amount owing by July 20, 2024.
3. If the Vendor Landlord and Purchaser do not pay the Tenant the full amount owing by July 20, 2024, the Vendor Landlord and Purchaser will owe interest. This will be simple interest calculated from July 21, 2024, at 6.00% annually on the balance outstanding.
4. The Tenant has the right, at any time, to collect the full amount owing or any balance outstanding under this order.

July 9, 2024
Date Issued



Jane Dean
Member, Vendor Landlord and Tenant Board

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Toronto ON M7A 2G6

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

2024 ONLTB 50494 (CanLII)