Order under Section 57
Residential Tenancies Act, 2006

Citation: FATAFTAH v RODRIGUEZ, 2024 ONLTB 21965
Date: 2024-04-02
File Number: LTB-T-018904-23

In the matter of: 232, 700 OSGOODE DR LONDON
ON N6E2H1

Between: FADI FATAFTAH — Tenants
EMAN BADDAD

And

NENCY MUNOZ RODRIGUEZ — Landlord

FADI FATAFTAH (F.F.) and EMAN BADDAD (E.B.) (the 'Tenants') applied for an order determining that NENCY MUNOZ RODRIGUEZ (the 'Landlord') gave a notice of termination in bad faith.

This application was heard by videoconference on January 24, 2024, and reconvened by videoconference on May 13, 2024.

The Tenants, the Landlord and the Landlord's legal representative, Loryn Lux, attended the hearing on January 24, 2024. The Tenants, the Landlord, and the Landlord's legal representative, Patrick Pacheco, attended the hearing on May 13, 2024.

Determinations:

Preliminary Issue

1. Following the hearing on January 24, 2024, I found the Tenants proved the allegations contained in the application on a balance of probabilities. This finding was stated in an interim order dated April 2, 2024. The hearing was reconvened on May 13, 2024, for further testimony and evidence relating to the Tenants' requested remedies.

2. Prior to the reconvene date of May 13, 2024, the Landlord changed legal representatives. I identified a possible apprehension of bias resulting from a personal connection to the Landlord's new legal representative, Mr. Pacheco. Though I do not have a close personal

friendship with Mr. Pacheco, we were classmates 5 years ago and have exchanged brief pleasantries mostly over social media since that time.

3. The test for reasonable apprehension of bias comes from well-established common law and is stated as:

> Whether a reasonable and informed person, with knowledge of all relevant circumstances, viewing the matter realistically and practically, would think that it is more likely than not that the decision-maker, whether consciously or not would not decide the matter fairly.

4. The Tenants spoke privately to a licensed paralegal present in the hearing room who offered pro bono summary legal advice because Tenant Duty Counsel was not available.

5. Neither the Tenants nor the Landlord submitted that they believe there was a reasonable apprehension of bias in these circumstances, and I determined that it was appropriate to proceed with the hearing.

Evidence and Analysis

6. This application is brought pursuant to subsection 57(1)(a) of the *Residential Tenancies Act, 2006* (the '*Act*') which requires the Tenant to prove each of the following on a balance of probabilities:

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

7. There is no dispute that the Landlord served the Tenants with a notice of termination ('notice') under section 48 of the *Act.* The notice was served on about November 19, 2021, with a termination date of January 31, 2022. It is also undisputed that the Tenant moved out in accordance with this notice on the termination date. It was further undisputed that on April 19, 2022, the rental unit was listed for sale. The central factual dispute is whether the Landlord served the notice of termination in bad faith.

8. I would observe at this point that the reverse onus provision in subsection 57(5) of the *Act* applies to this situation. This provision states:

> 57(5) For the purposes of an application under clause (1) (a), it is presumed, unless the contrary is proven on a balance of probabilities, that a landlord gave a notice of termination under section 48 in bad faith, if at any time during the period described in subsection (6) the landlord,
>
> …

(c) advertises the rental unit, or the building that contains the rental unit, for sale;

…

9. The period described in subsection (6) begins on the day the landlord gives the notice of termination and ends one year after the former tenant vacates the rental unit.

10. In this case, the presumption of bad faith is triggered because during the one-year period after the Tenant moved out of the rental unit, the Landlord advertised the rental unit for rent. Therefore, burden of proof shifts to the Landlord to establish on a balance of probabilities that she served the notice of termination in good faith.

11. It is undisputed that the Landlord and her former partner, Angel Costello (A.C.), were business partners and jointly managed matters dealing with the rental unit. A.C. regularly acted as the Landlords agent when communicating with the Tenants.

12. The Tenant, F. F. testified that they moved into the rental unit in 2016. F.F. further testified that in December 2019 the Tenants were approached by A.C. and advised that the Landlord had the intention to sell the rental unit unless the Tenants agreed to a new lease agreement and rent increase from $1,1119.80 to $1,500.00. F.F. stated that the new agreement was a 2-year fixed term ending on December 31, 2021, and that the agreement included a term that the Landlord would not sell the unit within the 2-year term. A copy of the new lease agreement was submitted by the Tenants. The Landlord did not dispute the Tenant's testimony with respect to this issue.

13. On November 19, 2021, the Tenants were served with a N12 notice of termination stating that the Landlord required the rental unit for the purpose of residential occupation for the period of at least one year.

14. The Landlord testified that prior to serving the Tenants with the notice she was living with her partner but that she and her partner were going through a separation. The Landlord testified she needed to move into the rental unit because her former partner was keeping the house they were living in together. The Landlord further testified the separation happened on November 2, 2021.

15. The Landlord testified that while waiting for the Tenants to vacate she stayed with friends and then she travelled to Cuba to stay with family. The Landlord testified that she returned from Cuba on February 7, 2022, and that she moved into the rental unit on March 3, 2022, after she had cleaned the rental unit to prepare it for her arrival. The Landlord provided a UHaul truck rental receipt and utility bills showing connection of gas and internet for the rental unit address for the month of March 2022.

16. The Landlord testified that she completed a full kitchen renovation in the rental unit but that she resided in the rental unit while the renovation was being done. The Landlord testified that she set up a temporary cooking station using small appliances on top of the washer

and dryer in the laundry room of the rental unit while the kitchen was being renovated. The Landlord submitted a photo of this temporary cooking station.

17. The Landlord testified that her previous home she lived in with her former partner was 3000 square feet with 5 bedrooms, a pool, and a hot tub whereas the rental unit was a 1,780 square foot townhouse with 3 bedrooms.

18. The Landlord testified that she is a Realtor and that she started to search for homes where she would be “more comfortable”. The Landlord further testified that she saw an

    opportunity to obtain a house that was closer to what she was accustomed to as far as size and amenities.

19. The Landlord further testified that she was not comfortable in the rental unit because the house was “too dark” and that she had no room to meet with clients. The Landlord further testified that her tires were slashed while parked at the new rental unit and that her former partner lived near by and therefore would drive by the rental unit frequently which made her uncomfortable as they did not have a good break up. The Landlord did not lead evidence that her tires were slashed specifically by her former partner.

20. The Landlord submitted an email from RBC Royal Bank of Canada dated April 14, 2022. The Landlord testified that in order to be approved to purchase the home she desired, the bank required her to sell the rental unit. The Landlord has highlighted information in this email. The highlighted portions read as follows:

    > Lastly, we will require the sale agreement for Osgoode to confirm a portion of the down payment as well. I believe you indicated it would be listed today which is good news, please send the sale agreement once finalized.
    >
    > With the vehicle lease remaining open it does take the debt servicing high, I can attempt to submit and ask for this to be approved but I would again only think this would be possible with Osgoode firm sold. Otherwise debt servicing will be over 70% which is too high to get approved.

21. I find, based on a balance of probabilities, that the Landlord has not proven that the N12 notice was served in good faith. I say this for the following reasons.

22. In 2019, the Tenants were advised that Landlord had intentions to sell the rental unit unless they agreed to a rent increase. The Tenants were asked to sign a new 2-year fixed term lease agreement which increased the monthly rent by approximately 34% per month. In exchange, the Landlord agreed not to sell the rental unit within the 2-year fixed term. One month from the end of this fixed term, the Tenants were served with a N12 notice by the Landlord indicating that the Landlord personally required the rental unit; however, the unit was then listed for sale less than 3 months after the Tenants vacated.

23. While the Landlord submits that she intended to live in the rental unit for at least one year but that she had a change in circumstances which resulted in her placing the rental unit for sale, I do not find that this claim is supported by the evidence before me.

24. The Landlord moved into the rental unit on March 4th and just 41 days later, the Landlord sought financing from her bank for a mortgage on a property she wanted to purchase and then subsequently listed the rental unit for sale. The Landlord stated that she was more comfortable in a home that was closer to what she had become accustomed to in both size and amenities. However, the Landlord was well aware of the rental unit's size and amenities prior to serving the N12. Therefore, I do not accept that the Landlord's circumstances unexpectantly changed after the Tenants vacated, she simply wanted a bigger and better home to live in.

25. The Landlord testified that she was also uncomfortable living in the rental unit because her tires were slashed and because her former partner lived in the area and therefore, drove past the rental unit regularly. The Landlord presented no evidence to suggest that her former partner was the perpetrator of the vandalism and the Landlord was well aware that her partner lived close by prior to serving the Tenants with a N12.

26. Based on the evidence and testimony before me, I find it is more likely than not that the Landlord never had an intention to occupy the rental unit for a period of one year and that obtaining vacant possession of the rental unit for a quick sale unincumbered by occupying tenants was the likely purpose of the notice served to the Tenants.

27. The Landlord testified she moved out of the rental unit on May 10, 2022. This was just over 3 months after the tenants had vacated. For this reason, I also find that the person referred to in the notice of termination (the Landlord herself) did not occupy the rental unit within a reasonable time after the Tenant vacated.

Remedies

28. The remedies the Tenants are requesting in the application are: out of pocket expenses for moving and storage, rent differential and general compensation.

Moving and Storage

29. The Tenants are seeking $1,000.00 for the cost incurred to hire a moving company. The Tenant submitted an invoice in the amount of $1,017.00 from ACC Contractor Inc Renovation. The Tenant also submitted a letter from the owner of this company confirming they provided moving services to the Tenant. The Tenant testified he couldn't remember the exact amount when filing out the T5 application form, but he knew the total to be around $1,000.00 which is why this amount is claimed rather than the actual amount on the submitted invoice.

30. In cross-examination Landlord's legal representative submitted that this company is stated as a garage door and contracting/renovation business and questioned the Tenant on the validity of the invoice.

31. The Tenant testified that when he called the company two years ago, they were offering moving services. The Tenant was also asked why he did not provide a receipt of payment for this service or any bank statement showing this amount of money was taken out of the Tenant's account. The Tenant testified that he had to borrow money from his uncle to pay for the movers and that he paid them in cash.

32. I accept the testimony and evidence of the Tenant that he paid $1,017.00 for the cost of hiring a company to move his belongings. The invoice submitted by the Tenant describes services provided as a 16 ft box truck, packing and loading 3 bedrooms household from 232-700 Osgoode Dr, London, off-loading & unpacking at 3417 Castle Rock Place. The receipt provides precise details and despite the fact that the company may now be offering different and/or additional services, this does not establish that the company did not, in fact, provide moving services to the Tenant. Additionally, even without this invoice and

    letter, I do not find the Tenants' requested cost of $1,000.00 to move a 3-bedroom townhome containing a family of 5 people to be unreasonable in the circumstances. Therefore, I find on a balance of probabilities that the Tenants' incurred these moving expenses and an order will issue for same.

    Rent Differential

33. At the hearing on January 24, 2024, the Tenant, F. F. testified that they were unable to find a comparable unit for the same rent they were previously paying. F.F. testified that their new townhouse is 1,502 square feet in comparison to their old unit which was 1,780 square feet. F.F. testified both the new and old units contain the same number of bedrooms (3), both have a garage, and the new unit has 2 bathrooms as compared to the old rental unit which has 1.5 bathrooms. F.F. further testified that their new rental unit does not have a fenced yard like their old unit did and that their new unit is outside of their children's school zones. Additionally, F.F. testified the new unit is also further from his place of employment. F.F. stated that his drive to work was approximately 5 minutes from the previous rental unit and that he now drives approximately 17 minutes to work. F. F. testified his monthly rent for the new unit is $2,200.00 per month and does not include water which was included in his previous rent of $1,500.00. This is a difference of $700.00 per month.

34. At the hearing date on May 13, 2024, the Tenant produced a copy of his lease agreement for his new rental unit and also provided a copy of a letter from Rembrandt Property Management confirming the Tenant's rent when he first occupied his new rental unit was $2,200.00 per month.

35. The Landlord's legal representative submits that the Tenant failed to call anyone from his current property management company to testify, nor did the Tenant submit any receipts or

bank records to prove that he is paying this amount. The Landlord's legal representative submits it is not enough to simply give documents to the Board and that the Tenant needs to prove they are authentic by supporting them with receipts or testimony from witnesses.

36. I do not accept the Landlord's legal representative's submissions. First, though hearsay is generally given less weight than credible oral testimony that is subject to crossexamination, it is acceptable at a Board hearing. Additionally, even if I were to give less weight to the letter provided by Rembrandt Property Management, the Tenant also submitted a copy of his lease agreement for his new rental unit. The lease agreement is a business record pursuant to section 35 of the *Evidence Act*, RSO 1990, c. E.23 and as such, it is an exception to the traditional rule against hearsay.

37. The Landlord's legal representative also submits that pages 8 through 14 of the lease agreement the Tenant submitted are missing and suggests that these pages may contain other agreements as to the amount of rent payable between the Tenants and their new landlord. I do not find the missing pages to be troubling. The lease agreement submitted by the Tenant is a "Standard Form Lease Agreement" on which pertinent information relating to term, rent, utilities and amenities are found on the pages submitted by the Tenant.

38. Finally, I find the Tenant's testimony about his new rental unit to be both credible and reliable. His oral testimony is supported by the documents he provided and the Tenant testified in a clear and concise manner. I have no reason to disbelieve him.

39. In considering a rent abatement, the Board must consider whether the rental units are comparable, although they need not be exact. The units in this case are very comparable in size with only a 278 square foot difference between the two. Though the Tenants may now be living in a newer, more modern build with 2 bathrooms as opposed to 1.5 bathrooms, they have also lost the use of a fenced back yard and are further away from preferred schools and F.F.'s place of employment. Therefore, the Landlord's shall be ordered to pay a rent differential in the amount of $700.00 per month for the period of 1 year totalling $8,400.00.

General Compensation

40. The Tenants are also seeking general compensation in the amount of $1,235.00. The Tenant has quantified this amount as what he will pay for water utilities at approximately $65.00 per month and a hot water tank rental at approximately $37.99 per month. These charges are an additional expense to his current rent charge. The Tenant testified the water utility was included in his rent previously. The Landlord did not dispute this.

41. Section 57(3)(1.1) of the *Act* sets out the orders that can be issued when the Board determines that a former tenant was served a notice under section 48 in bad faith and states the following:

An order that the landlord pay a specified sum to the former tenant as general compensation in an amount not exceeding the equivalent of 12 months of the last rent charged to the former tenant. An order under this paragraph may be made regardless of whether the former tenant has incurred any actual expenses or whether an order is made under paragraph 2.

42. The Tenant submitted copies of London Hydro utility bills for April through July 2022 which include charges for water utilities. The Tenant also submitted copies of Enercare bills for March and April 2022 showing the fee paid for the hot water tank rental.

43. I note that the amounts of these bills vary from month to month. The Tenant did not seek to amend the amount of general compensation on the application to reflect these varying amounts.

44. Despite the Tenant failing to submit his water usage and hot water tank for the entire year, pursuant section 57(3)(1.1), I am able to consider the Tenant's general compensation request regardless of any actual incurred expenses.

45. F.F. testified that he and his family suffered extreme financial hardship due to the Landlord's bad faith eviction. F.F. testified that more than 70% of the family's sole income was to pay the higher rent at their new rental unit. F.F. also testified about the adverse effect the move had on his children. He testified that his youngest child had to switch schools and refused to attend school for 2 months after the family's move. The Tenant also testified that his oldest child refused to switch to a new secondary school and that the family is no longer within the school bus district. As a result, the Tenant's oldest child now has to be driven to school or take public transit which is an additional financial hardship for the family.

46. The Tenant's testimony on the emotional and financial impact of the notice of termination served in bad faith was detailed and compelling and I have no reason to disbelieve him. The Tenants' request for general compensation, quantified as an estimation of his additional costs for water utilities is not excessive or unreasonable. Therefore, the Tenants' requested remedy for general damages in the amount of $1,235.00 will be ordered.

47. I have considered all of the evidence presented at the hearing and all of the oral testimony and although I may not have referred to each piece of evidence individually or referenced all of the testimony, I have considered it when making my determinations.

48. This order contains all of the reasons for the decision within it and no further reasons will be issued.

It is ordered that:

1. The total amount the Landlord shall pay the Tenants is $10,688.00. This amount represents:

- $8,400.00 for increased rent the Tenants have incurred for the one-year period from February 1, 2022 to January 31, 2023
- $1,000.00 for the reasonable moving, storage and other like expenses that the Tenants have incurred as a result of having to move out of the rental unit.
- $1,235.00 for general compensation.
- $53.00 for the cost of filing the application.

2. The Landlord shall pay the Tenants the full amount owing by August 31, 2024.
3. If the Landlord does not pay the Tenants the full amount owing by August 31, 2024, the Landlord will owe interest. This will be simple interest calculated from September 1, 2024 at 7.00% annually on the balance outstanding.
4. The Tenants have the right, at any time, to collect the full amount owing or any balance outstanding under this order.

June 4, 2024 _____ **Date Issued**

Melissa Anjema
Member, Landlord and Tenant Board

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