



Order under Section 57 Residential Tenancies Act, 2006

Citation: BAKER v MCGARVEY, 2023 ONLTB 78499

Date: 2023-12-07

File Number: LTB-T-064408-22

In the matter of: 2, 82 CEDAR ST
BELLEVILLE ONTARIO K8P3M1

Between: Sarah Baker Tenant

And

Anthony McGarvey Landlords
Elizabeth McGarvey

Sarah Baker (the 'Tenant') applied for an order determining that Anthony McGarvey and Elizabeth McGarvey (the 'Landlords') gave a notice of termination in bad faith.

This application was heard by videoconference on October 26, 2023.

The Landlord, Anthony McGarvey ('AM'), the Landlords' witness, Emma McGarvey ('EM'), the Landlord's legal representative, Ian MacInnis ('IM'), the Tenant, and the Tenant's legal representative, Tanner Gibson ('TG'). attended the hearing.

Determinations:

1. As explained below, the Tenant did not prove the allegations contained in the application on a balance of probabilities. Therefore, the application is dismissed.
2. Subsection 57(1)(a) of the *Residential Tenancies Act, 2006* (the 'Act') requires the Tenant to prove each of the following on a balance of probabilities:
 - The Landlords gave the Tenant an N12 notice of termination under section 48 of the Act, and it was given in bad faith;
 - The Tenant vacated the rental unit as a result of the N12 notice of termination; and
 - No person referred to in subsection 48(1) of the Act occupied the rental unit within a reasonable time after the Tenant vacated; and

3. This is the Tenant's application, and the Tenant therefore bears the burden of proving each of these conjunctive elements of the legal test on a balance of probabilities. The only exception to this is if any of the elements in subsection 59(5) of the Act are present, in which case there is a presumption the notice of termination was given in bad faith unless the contrary is proven by the landlord on a balance of probabilities. In this case, none of the elements described in subsection 59(5) are present.
4. To prove a fact on a balance of probabilities, there must always be sufficient clear, convincing, and cogent evidence of the fact: *F.H. v. McDougall*, 2008 SCC 53 (CanLII), para 46.

Tenant's Evidence

5. The Tenant said her tenancy began on June 1, 2001. At the time, the Landlord was Marie McGarvey, who is AM's mother, and there is no written lease. She said the monthly rent was \$420.00, including utilities.
6. The Tenant said that in 2009, she received a notification advising that the Landlord was changing because the residential complex was sold to the Landlords.
7. The Tenant entered as evidence a copy of an N12 notice of termination, dated May 1, 2019. It is signed by AM indicating that the Landlords' child intends to move into the rental unit. The termination date in the N12 notice was August 31, 2019.
8. The Tenant said she decided to contest the N12 notice. She said the Landlord filed an application and there was a hearing on August 22, 2019. She said an order was issued near the end of July 2020, but she had already moved out. She said she found a new place to live and vacated the rental unit on January 2, 2020.
9. She said she started looking for new living accommodation after receiving the N12 notice and did not wait for the order because she believed the order would end the tenancy. She believed this because she said the Member hearing the application indicated that she would be given time to find a new place to live. She was worried about being homeless, so kept looking for new accommodation while waiting for the order. The order did in fact terminate the tenancy.
10. The Tenant said that she gave the Landlord an N9 notice for a January 15, 2020 move out after finding her new accommodation.
11. The Tenant said it was very stressful searching for new accommodations, and she was sincerely worried about being homeless.
12. After moving out, the Tenant said the bus she regularly took passed the rental unit. She said she started physically checking the rental unit regularly around September 2020. At that time, she looked in the window, and saw that electrical had been roughed in and some work was being done to the rental unit. She said it did not appear habitable, so she asked a neighbour across the street if anyone had moved into the unit, and was told no.

13. The Tenant entered two photos she took on October 28, 2020. She said one was a bedroom and the closet had been removed, and the other shows some scrap wood in the unit. She took these photos from outside, through windows.
14. The Tenant also entered as evidence photos from June 2021, and the unit still looked the same at the time. This was the last time the Tenant was at the rental unit.
15. The Tenant said that at the hearing of the application, EM said that she had finished school, was moving back to Belleville, and needed the rental unit for her occupancy. She said she no longer believes this, because she said that EM actually went back to school to attend Teacher's College at Queen's University. She entered as evidence a document from the Queen's University website indicating the deadline for applying would have been December 2019. She also entered another document from the Queens University website showing the academic calendar for the B.Ed. program for the 2020-2021 academic year.
16. When asked if she believes EM moved in, the Tenant said she assumes that EM went back to school. She said the Landlords say EM moved in in September 2022, but she does not trust them anymore.
17. The Tenant also gave substantial evidence about the impact that this process had on her. I acknowledge that the end of the tenancy, finding new accommodation, and moving had a profound impact on the Tenant.
18. On cross-examination, the Tenant acknowledged that she was not aware if EM physically attended Queen's University. In terms of repairs to the rental unit, the Tenant said she did not know if the Landlords were conducting the repairs on their own.

Landlord's Evidence

Emma McGarvey

19. EM said that AM is her father. She said that she was living with her parents in May 2019 when the N12 was given. She said she is 27 years old now, and was 24 at the time.
20. EM said she genuinely intended to move into the rental unit. Her grandparents were elderly and unwell, and were moving into her parents home as well. She said her grandparents moved into her parents' home prior to 2020. She wanted to move out so that her grandparents would have more room, and for her own privacy. She said she was also planning to return to school to become a teacher. She said this would include being in primary school classrooms, and did not want to live in the home with her grandparents, fearing she may get them sick.
21. EM said she did attend the B.Ed. program at Queen's University for the 2020-2021 academic year. She said it was entirely virtual, and she was not required to physically attend Queen's. She did have to physically attend schools for her practicum, but that was in the Belleville area.
22. EM said she ultimately moved into the rental unit on September 21, 2022, and still lives there. She moved in about 21 months after the Tenant moved out. She said this delay was

not because of her schooling, it was because of delays in preparing the unit caused primarily by the COVID-19 pandemic. She said that she maintained the desire and intention to move into the rental unit for the entire relevant period. She said she was particularly stressed about potentially bringing COVID-19 into her parents' home, because of her grandparents' age and physical conditions.

23. When asked why it took 21 months for her to move in after the Tenant vacated, EM said that there were delays in preparing the unit due to Covid, and her grandparents also required a lot of care, which was a priority for the family.
24. EM said she graduated from the B.Ed. program in August 2021.
25. On cross-examination EM acknowledged that she was not certain that her program would be entirely remote when applying, but said she chose Queen's University because she would have been able to commute to Kingston from Belleville. She said she was not planning to move, and even during the last year of her undergraduate degree, she commuted a lot between Belleville and Kingston. She said that her intention was to live in the rental unit during her B.Ed. program, whether it was virtual or not.

Anthony McGarvey

26. AM said he works as the general manager of a national snack food company with about 120 employees. He said he gave the Tenant the N12 notice because his mother-in-law and father-in-law were ill and moving into his home. His daughter EM was also living there, and the intention was for EM to move into the rental unit.
27. AM gave extensive evidence about the relevant timeline.
28. He said that after the Tenant vacated the rental unit he began renovating the unit so that EM could move in. He also said that after the Tenant moved out, another tenant in the building gave notice of termination of their tenancy. There are three residential units in the building, and two of the three were going to be vacant in February 2020. AM decided that this would be a good time to upgrade the building's electrical system so that each unit could have its own breaker panel. He also said that upgrades or repairs were needed to the rental unit's bathroom, kitchen, and flooring.
29. AM said that on March 13, 2020, COVID-19 stopped travel. He said that because of the pandemic, Elexicon, the company who would be installing the new breaker panels, stopped doing installations due to the pandemic.
30. AM also said that on April 3, 2020, he got a headache while at work, and decided to isolate at the rental unit for 14 days to protect his in-laws, fearing he may have contracted COVID19. He said he was living in both vacant units at the time, because one did not have running water, and the other did not have electricity.
31. AM said that Elexicon resumed installations on June 1, 2020, but they ran into another issue. The Municipality had refused to issue a permit for the panel installations because of the Zoning by-law and the building's status as a triplex.

32. The Landlord said that on June 3, 2020 he swore an affidavit to confirm the building was used as a triplex since before 1978, and on June 15, 2020 the Municipality had accepted that use of the property as a triplex was a legal non-conforming use, and permitted installation of the panels. AM said the work then started, and the panels were installed around the end of June 2020.
33. AM said his mother-in-law died November 29, 2020, which was hard on the family. Leading up to this, AM said he was very busy at work. He would get home from work around 5:00 or 5:30, then give his wife a break from caring for his in-laws for a couple hours. AM said after his mother-in-law died, he was spending some additional time with his father-in-law, since he had just lost his wife, and the pandemic meant that he was quite isolated.
34. AM said he finally began renovating the rental unit on May 14, 2021. He said his son was in town at the time and was helping him. On June 16, 2021 AM bought new kitchen cupboards for the rental unit. He bought them from an auction house and physically obtained them that day.
35. On July 31, 2021 he started drywalling in the rental unit.
36. On August 27, 2021, the Landlords took AM's father-in-law on vacation to Nova Scotia to see where his grandson (the Landlords' son) was attending university. AM said his father-in-law's health was failing, he had been cooped up due to the pandemic, and the family knew this would be his last vacation.
37. On October 12, 2021, AM was very busy at work, and decided to reach out to a contractor to help finish the work on the rental unit. He had been doing the work on his own up to this point. He said the contractor he contacted did not reply to him. On January 15, 2022, he reached out to, and ultimately retained, a different contractor. He was advised the work would be done by April 2022. The contractor then contracted COVID-19 on February 24, 2022, which caused some delay. The contractor then advised AM on April 2, 2022 that he had a family emergency. On April 24, 2022, AM was advised that his contractor's drywall team was delayed on another job. After some further delays EM painted the unit on September 6, 2022, the bathroom tiles were finished on September 13, 2022, and EM moved in on September 21, 2022.
38. AM said that the entire time, he was doing his best to get the unit ready for EM to move in, and the only reason she did not move in earlier was because of unexpected delays.
39. AM said that since the Tenant moved out, no one has lived in the rental unit except EM, who still lives there, and AM for a short time when he was isolating out of concern he had contracted COVID-19.
40. AM acknowledged there are gaps in his timeline where it did not appear that anything was happening. He said that as the general manager of a national snack food company, work was very busy during the pandemic, and his ill in-laws and the death of his mother in-law took a lot of time as well.

Law & Analysis

41. As noted above, the elements of the legal test are conjunctive. I accept that the Tenant received the N12 notice, and moved out of the rental unit because of the notice. EM did eventually move into the rental unit, but it was 21 months after the Tenant moved out. The Landlord gave evidence explaining this delay. This was a notice of termination for EM's occupancy, not to renovate the unit, but it is not uncommon or unreasonable for a landlord to conduct some repairs or renovations before moving into a rental unit after giving an N12 notice.
42. 21 months is a lengthy delay. AM gave credible evidence explaining what was happening at the relevant time, and I acknowledge that the pandemic was not expected and contributed to some delay. 21 months may still be unreasonable for the purposes of the legal test, but I ultimately do not need to make a determination about that issue. That is because each element of the legal test must be proven on a balance of probabilities, and another part of the test was not proven.
43. The Tenant has not proven, on a balance of probabilities, that the N12 notice was given in bad faith. I accept the evidence of AM and EM that the genuine intention when the N12 notice was given was for EM to move into the rental unit for her own use for at least a year. I also accept that this remained the genuine intention from the time the N12 notice was served up until EM moved into the unit in September 2022. She remains living in the unit more than one year after moving in.
44. Since the Tenant has not proven that the N12 notice was given in bad faith, the Tenant's application must be dismissed.

It is ordered that:

1. The Tenant's application is dismissed.

December 7, 2023

Date Issued

15 Grosvenor Street, Ground Floor
Toronto ON M7A 2G6

Mark Melchers

Member, Landlord and Tenant Board

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