



**Order under Section 69
Residential Tenancies Act, 2006**

Citation: Janzen v Carvalho, 2023 ONLTB 77207

Date: 2023-11-24

File Number: LTB-L-046839-22

In the matter of: 1, 223 Ontario St
St Catharines ON L2R5L2

Between: John Janzen Landlord

And

Melissa Carvalho Tenant
Alexander Kudelski

John Janzen (the 'Landlord') applied for an order to terminate the tenancy and evict Melissa Carvalho and Alexander Kudelski (the 'Tenant') because the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant.

This application was heard by videoconference on September 5, 2023.

The Landlord, the Landlord's witnesses Joao Dutra, Morgan Dickson and Jim Slominsky, the Landlord's legal representative J. Callender, the Tenant Alexander Kudelski and the Tenant's witness Richard Parker attended the hearing.

Determinations:

1. The Landlord served a Form N5 on the basis the Tenant's behaviour has substantially interfered with another tenant's or the Landlord's reasonable enjoyment of the residential complex and/or their lawful rights privileges or interests.
2. There are 18 residential units in the building, with the Tenant residing on the 1st floor. The building is non-smoking. At the time of entering the lease, the Tenant agreed to the Landlord's no smoking provisions, which provided, among other stipulations, that the Tenant shall not smoke within the residential complex or "*within 9 metres of doorways, operable windows and air intakes*".

3. This is the second N5 served by the Landlord within the past 6 months. The first N5 was served on July 28, 2022 and alleges that on July 26, 2022, the Landlord received a complaint of the Tenant smoking on the steps of the back door and thus, within 9 metres of the building. Similarly, the Landlord's second N5 alleges that on August 11, 2022 and August 15, 2022, the Tenant smoked too close to the building and bothered other tenants, once again breaching the no-smoking lease provisions,

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4. The Landlord testified as to complaints received due to the close proximity of the Tenant's smoking and produced email/text correspondence from a prior tenant Joao Dutra (JD) on July 26, 2022 and August 11, 2022. In correspondence dated August 11, 2022, JD advised the Landlord that the Tenant had "*just stopped smoking on the steps and is smoking in his car*". The Landlord testified he subsequently received a notice of termination as a result of the Tenant's smoking.
5. At the hearing, JD largely corroborated the Landlord's testimony and testified as to the Tenant's frequent smoking. JD indicated that in the summer of 2022, he opened his window and noticed the Tenant smoking really close to the building. As cigarette smoke was coming into his rental unit, he sent an email to the Landlord on July 26, 2022. He stated the Tenant was rude when asked to move farther away from the building. According to JD, the Tenant subsequently started smoking in his car which was "*right in front of*" the building, and thus, he text the Landlord on August 11, 2022 inquiring about terminating the tenancy.
6. The Tenant testified that after his confrontation with JD, he started smoking inside his car which the Tenant contends is more than 9 metres from the building. The Tenant states sometime in August 2022, he started smoking on the street, away from the building. Overall, I found the Tenant's testimony somewhat vague as to his whereabouts/timing. Upon hearing all the evidence, I find the Landlord's evidence more believable that the Tenant was smoking within 9 metres of the building in July 2022 and on August 11, 2022, as it was corroborated by past written communications sent from JD to the Landlord, and by JD's direct testimony.
7. I also find on a balance of probabilities the Tenant has substantially interfered with another tenant's reasonable enjoyment of the residential complex and the Landlord's lawful rights privileges or interests, as the Tenant's smoking caused another tenant to leave the building.

Section 83

8. Section 83 requires that I consider all the circumstances in the case, including the Tenant's and the Landlords' situations, to determine whether it would be appropriate to delay or deny eviction in the form of section 83 relief.
9. The Landlord indicated there are rent arrears and since serving the 2nd Form N5 there have been further incidents of smoking contraventions. In this regard, the Landlord's employee, Morgan Dickson (MD), testified she encountered the Tenant's roommate on July 8, 2023 outside the rental unit. When the rental unit door was opened, she testified she could smell smoke coming from within the rental unit. Similarly, the Landlord's employee, Jim Slominsky (JS), testified he attended at the rental unit in mid-August 2023 to address an internet/router issue and could smell smoke.
10. The Tenant has been a living at the rental unit since 2021 and seeks to remain at the rental unit. He indicated he has a co-worker living down the hall, as well as good relationship with other tenants in the building. Upon considering the parties' circumstances, I find it

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would not be unfair to deny the eviction so long as the Tenant corrects his behaviour. I understand and sympathise with the Landlord's concerns about the smoking, however if the Tenant complies with my conditional order below, those concerns will be satisfied. As a result, conditional relief will be granted on the terms set out below.

It is ordered that:

1. The Tenant shall not smoke inside the building in which the rental unit is located, or within 9 meters of doorways, operable windows and air intakes of the building.
2. If the Tenant fails to comply with the conditions set out in paragraph 1 of this order, the Landlord may apply under section 78 of the *Residential Tenancies Act, 2006* (the 'Act') for an order terminating the tenancy and evicting the Tenant. The Landlord must make the application within 30 days of a breach of a condition. This application is made to the LTB without notice to the Tenant.
3. The Tenant shall pay to the Landlord \$186.00 for the cost of filing the application.
4. If the Tenant does not pay the Landlord the full amount owing on or before December 31, 2023, the Tenant will start to owe interest. This will be simple interest calculated from January 1, 2024 at 7.00% annually on the balance outstanding.

November 24, 2023

Date Issued

Peter Nicholson
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.

2023 ONL TB 77207 (CanLII)