



Order under Subsection 135 Residential Tenancies Act, 2006

Citation: Deruz v McGarvey, 2023 ONLTB 66514

Date: 2023-10-16

File Number: LTB-T-079711-22

In the matter of: (multiple) 322 Lakeshore Road West
Mississauga ON L5H1G8

Tenants

Between: Darryl Deruz
Paul Amariutei
Rodica Amariutei
Jeanette Holloway
Shawna McInnes
Roy Mitenko
Mike Thornley

And

Stephen McGarvey

Landlord

This is a multiple unit application, brought by Darryl Deruz, Paul Amariutei, Rodica Amariutei, Jeanette Holloway, Shawna McInnes, Roy Mitenko and Mike Thornley (the 'Tenants') against the landlord of 322 Lakeshore Road West, Stephen McGarvey (the 'Landlord').

In their application, the Tenants claim that the Landlord collected or retained money illegally. The Tenants allege that the Landlord violated section 116 of the *Residential Tenancies Act, 2006* (the 'Act') by increasing the Tenants' monthly rent without providing the required notice. The Landlord opposed this application.

This application was heard by videoconference on July 25, 2023.

The Landlord's Representative, Jordan Nieuwhof, and the Tenant attended the hearing.

The Landlord's Agent, Cindi Ross, attended the hearing as a witness for the Landlord.

Determinations:

Preliminary Matter

1. At the start of the hearing, the Landlord raised a preliminary matter about whether or not this application can proceed. The Landlord submitted that the application was not brought within the one-year limitations period contemplated by Section 135(4), and, on that basis should be dismissed.

2. The Landlord submitted that beginning on April 1, 2020, the Tenants each paid in accordance with the Notice of Rental Increase (NORI) and did not file an application by April 1, 2021. The Landlord submitted that, even if NORI was not served in accordance with the Act, section 135.1 would work to deem the increase in the NORI not to be void.
3. On March 20, 2020, the Government of Ontario made an Emergency Order under the *Emergency Management and Civil Protection Act*, suspending limitation periods and procedural time periods relevant to tribunal proceedings. The suspension was retroactive to March 16, 2020 (O.Reg 73/20).
4. Suspended limitation periods and procedural timelines resumed on September 14, 2020 (O.Reg. 457/20).
5. Section 6 of O.Reg 73/20 states:

For greater certainty, any limitation period or period of time within which a step must be taken in a proceeding that is temporarily suspended under this Regulation resumes running on the date on which the temporary suspension ends and the temporary suspension period shall not be counted.

6. In this case, the increase to the Tenants' rent happened during the suspension period. The original deadline for filing T1 would have been a year from when the Tenants began paying the increased amount (on or before April 1, 2021). However, the Tenants did not file their application until August 9, 2021.
7. The Landlord states that section 56 of O.Reg. 516/06 prohibits the Board from extending or shortening time to file an application. In relying on this, the Landlord appears to suggest that the Government of Ontario's Emergency Order does not apply to the timelines for applications brought before the Board under the Act.
8. The Landlord appears to rely on the language in section 2 and 2.0.1 of O.Reg 73/20, specifically alluding to the discretion of the tribunal, to suggest that since the Regulations under the Act were not changed once O.Reg 73/20 was implemented, the suspension of limitation period does not apply to applications before the Board.
9. The Tenants confirmed that they paid the rent increase but that it was paid under protest. The Tenants submitted that they always intended to challenge the rent increase and told the Landlord this. The Tenants indicated that on one occasion, they tried to go into a Landlord and Tenant Board office and file the application in person, but were unable to do so because the office was closed.
10. There was a clear purpose to the suspension of the limitation periods. The justice system in Ontario was faced with COVID-19's unprecedented impact. The Province responded by implementing a suspension of limitation periods and time periods in proceedings to ensure that people would not experience legal consequences if the original time requirements of their case were not met as a result of the pandemic.

11. The Tenants fall within this category of people. The Tenants were clear of their intention to file an application and paid rent under protests. Their ability to file their application was impacted by COVID-19's unprecedented impact on the justice system, which included the closure of the Landlord and Tenant Board's offices.
12. On this preliminary issue, I find that the Tenants' application was filed in accordance with the Act. I find that the limitation periods under the Act were suspended as a result of O.Reg. 73/20. The suspension applied unless a person mentioned in section 2.0.1 of O. Reg. 7/20 deemed otherwise, which did not occur.
13. I do not find that 135.1 impacts the Tenants' ability to bring this application in light of the above. I find that to read it otherwise would contravene the application of the suspension of the limitation period.
14. Therefore, I will turn to the merits of the Tenants' application.

Notices of Rent Increase

15. As explained below, the Tenants have not proven the allegations contained in the application on a balance of probabilities. Therefore, the application is dismissed.

- i. Evidence at Hearing

16. The Tenants state that each of them received a NORI dated January 2, 2020, with an effective date of April 1, 2020. The Tenants state that NORI was left in their respective mailbox, all of which are located at the front of the building.
17. The Tenants and the Landlord agree that if the NORI was delivered on January 2, 2020 to the Tenants' mailboxes then the NORI is valid, and the increase outlined therein would be effective on April 1, 2020.
18. The dispute between the Tenants and the Landlord relate to the date of delivery. It turns on the difference of one day. The Tenants state that they discovered the NORI on January 3, 2020 or on a later date, and thus the Landlord failed to provide the Tenants with 90 days notice prior the effective date of the rental increase.
19. The Landlord states that the NORI was delivered was January 2, 2020, which is also the date that the Landlord's Agent signed the NORI.
20. The Tenants indicated that they had a regular practice of checking their mail daily, most times at the end of the day. The Tenants submit that they would have discovered the NORI on January 2, 2020, if the Landlord placed it in their mailboxes on that day. Since they did not discover the NORI on January 2, 2020 but on January 3, 2020, the Tenants submit that the NORIs must have been placed in their mailboxes on January 3, 2020 and not January 2, 2020.
21. The Tenants state that on January 11, 2020, they wrote to the Landlord to tell them that each had received a NORI on January 3, 2020. Prior to this date, the Tenants also asked

for a copy of the video surveillance for January 2 and January 3, 2020, which they suspected would show that the NORI was not delivered on January 2, but instead on January 3.

22. The Landlord's Agent stated that she was the one who attended the apartment building on January 2, 2020 and delivered the NORIs to the Tenants' mailboxes. She testified that she did this on the same day that she dated the NORIs. In support of her statement, the Landlord's Agent provided a copy of her 407 Transponder record that shows a trip on January 2, 2020 that starts at Hwy 404 and goes to Hwy 427 (and a corresponding return trip), suggesting that this is the route that she travels to get to the apartment building, which is located on Lakeshore. This information suggests that at some point between 11:45 a.m. and 6:17 p.m., the Landlord's Agent was at the apartment building. The record of the 407 Transponder is Exhibit 1.
23. The Landlord's Agent also produced a page of her agenda book showing January 1-4. The Landlord's Agent testified that on January 1, 2020, she wrote the NORIs but dated them on January 2, 2020, the date that she intended to deliver the NORIs to the Tenants. On the agenda page at 4:00 p.m. on January 1, 2020, the Landlord's Agent lists "Rent Increases x8" and on January 2, 2020, "rent run." The agenda page is marked as Exhibit 2.
24. The Landlord's Agent's testimony is consistent with both Exhibit 1 and Exhibit 2.
25. The Landlord's Agent was asked why the Landlord did not produce the surveillance videos for January 2 and January 3, 2020. These videos would have shown her attendance at the apartment building and near the mailboxes. The Landlord's Agent stated that these videos are for safety purposes only, but had she known that the Tenants were going to bring this application, she would have preserved the video, suggesting that it would have supported the Landlord's defence to the application.

ii. Analysis

26. Section 116 (1) states:

A landlord shall not increase the rent charged to a tenant for a rental unit without first giving at least 90 days written notice of the landlord's intention to do so.

27. Notice may be given in a number of ways, including by leaving the notice in the tenant's mailbox or if there is not mailbox, by leaving it at a place where mail is ordinarily delivered to the tenant. If service is made in this way, it is considered received on the day that the landlord leaves the notice in the mailbox.
28. When a notice has to be made within a specific number of days, the days are counted by excluding the first day and including the last day (see 1.13 of the Landlord and Tenant Board's Rules and Procedure).
29. In this case, the only issue in dispute is whether or not the Landlord delivered the NORI to the Tenants within the timeline outlined in Section 116. If the Landlord delivered the NORI on January 2, 2020, then the increase in rent is valid – this is 90 days. I am counting the

dates from January 3, 2020 to April 1, 2020, in accordance with the Board's Rules and Procedures. If the Landlord delivered the NORI on January 3, 2020, then the increase is void – this is 89 days. In this, I am counting the dates from January 4, 2020 to April 1, 2020, in accordance with the Board's Rules and Procedures.

30. I have considered the evidence before me at the hearing, which I summarized in the previous section of this order. The Tenants are suggesting that, since it is their pattern to check their mail daily, and since they did not see the NORI in their mail on January 2, 2020, then this is proof that the Landlord did not serve the NORI on January 2, 2020, but rather the following day when the Tenants discovered the NORI in their mailboxes.
31. The Landlord's Agent, the one who actually delivered the NORIs, testified to her recollection of what she was doing on January 1 and January 2, 2020. Her oral evidence was supported by both her 407 Transaction records and contemporaneous notes in her agenda.
32. Although I find the Tenants credible, their evidence is circumstantial. It could have been that on the day that the Landlord's Agent delivered the NORIs, the Tenants may have checked their mail before it was delivered.
33. The Landlord's Agent's evidence was supported by contemporaneous notes and records, which supported her testimony. In this way, I favour the Landlord's Agent's evidence because it could be verified against documents generated by a third party and also notes made in her agenda.
34. In summary, the Landlord did not collect rent in excess of the amount allowed by the Act. On a balance of probabilities, I find that the Landlord's Agent delivered the NORIs to the Tenants on January 2, 2020, providing the Tenants with the appropriate notice under the Act.

It is ordered that:

35. The Tenants' application is dismissed.

October 16, 2023

Date Issued

Julia Toso

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.