



Order under Section 57 Residential Tenancies Act, 2006

Citation: Waring v Kotanko, 2023 ONLTB 62773

Date: 2023-09-22

File Number: LTB-T-048879-22

In the matter of: 183 CHANDOS DRIVE
KITCHENER ONTARIO N2A 3Z6

Between: Donna Waring
Wendel Novotny Tenants

And

Gregory Kotanko Landlord

Donna Waring and Wendel Novotny (the 'Tenants') applied for an order determining that Gregory Kotanko (the 'Landlord') gave a notice of termination in bad faith.

This application was heard by videoconference on August 8, 2023 at 1:13 p.m.

The Landlord Gregory Kotanko, the Landlord's representative Peter M. Miller, counsel and the Tenant Donna Waring, the Tenant's representative Brittany Colley, licensed paralegal attended the hearing. Nicole Kotanko and Ann Kotanko also attending the hearing as the Landlord's witnesses.

Determinations:

1. As explained below, the Tenant proved the allegations contained in the application on a balance of probabilities. Therefore, the Landlord must pay \$12,199.10 to the Tenants by October 3, 2023.

Landlord gave N12 for own use in bad faith

2. The T5 application was filed March 20, 2022, alleging the Tenants moved out of the rental unit because the Landlord gave the Tenants an (N12) Notice of termination in bad faith claiming they required vacant possession of the rental unit in order for residential occupation by the Landlord for a period of at least one year.

3. The N12 Notice was served under section 48(1) of the Act which states:

48 (1) A landlord may, by notice, terminate a tenancy if the landlord in good faith requires possession of the rental unit for the purpose of residential occupation for a period of at least one year by,

- (a) the landlord;
- (b) the landlord's spouse;
- (c) a child or parent of the landlord or the landlord's spouse; or
- (d) a person who provides or will provide care services to the landlord, the landlord's spouse, or a child or parent of the landlord or the landlord's spouse, if the person receiving the care services resides or will reside in the building, related group of buildings, mobile home park or land lease community in which the rental unit is located.

4. The Tenants seek a rent abatement, compensation for the differential in rent between the rental unit and their current unit, compensation for out-of-pocket moving, storage and other like expenses that the Tenants incurred as a result of having to move out of the rental unit and for the Landlord to pay a fine.

5. Section 57(1) of the *Residential Tenancies Act, 2006* establishes a three-part test. In order to be successful in the T5 application, the Tenants must establish all three of the requirements of subsection 57(1)(a) on a balance of probabilities:

- The Tenant received a notice of termination under s. 48 of the Act and the Tenant moved out of the rental unit as a result of the Landlord's notice; and
- The Landlord did not in fact move into the rental unit within a reasonable time after the Tenant vacated; and
- The notice was given in bad faith meaning the Landlord had no intention of moving into the rental unit.

6. It is not disputed the Landlord gave a Notice of termination (N12) to the Tenants on January 6, 2021 with a termination date of March 31, 2021.

7. It is also not disputed the Tenant vacated the rental unit on April 3, 2021 as a result of the N12 Notice of termination given to the Tenants on January 6, 2021.

Bad Faith and Failure of the Landlord to move into the rental unit

8. Subsections 57(5) and 57(6) of the Act establish there is a rebuttable presumption of bad faith if the Landlord advertises the rental unit, or the building that contains the rental unit, for sale less than one year after the Tenant vacated the rental unit.
9. The rebuttable presumption is engaged here, as it was undisputed that the rental unit was advertised for sale and then sold less than 3 months after the Tenants vacated.
10. I find that the Landlord failed to rebut the presumption of bad faith.
11. The Landlord testified the Landlord moved into the unit on April 4, 2021, contacted his realtor on April 5, 2021 and listed the unit for sale on April 6, 2021, and moved out of the unit on June 21, 2021.
12. Even if the Landlord's circumstances had changed after he had moved into the rental unit, I do not find that the Landlord ever genuinely intended to reside in the unit for at least 12 months, as he listed it for sale almost immediately after moving in and only lived in the rental unit for 78 days. This alone is sufficient to support a finding of bad faith.
13. The Landlord testified that when he issued the N12 Notice of termination he had assumed there was sufficient space in the unit for himself, his wife and his daughter and their young grandson; however, when he moved into the unit on April 4, 2021 he newly realized that there was not sufficient space, nor was it feasible to renovate the basement to accommodate his daughter and their grandson. I find it extremely unlikely that the Landlord was not aware of the size of the unit when he served the N12 notice or that the basement would not be suitable to accommodate his family until the day he moved into the unit.
14. Further, although the Landlord submitted that there was a change in his family's circumstances which resulted in too many people for too little space, the Landlord did not submit sufficient evidence regarding how this change in circumstances impacted the decision to issue the Notice of termination as the Landlord testified he knew his daughter would be living with him and his wife prior to issuing the notice. The Landlord also did not submit any documentation showing that the basement was not appropriate to accommodate his family, nor did the Landlord submit any financial documentation showing that renovations were unfeasible to support his testimony.
15. On a balance of probabilities, I find that the Landlord knew or ought to have known about the size, space and whether the basic conditions of the unit were suitable for his family prior to serving the N12 notice. Furthermore, the Landlord's daughter testified she had been living with the Landlord since August 2020, approximately 8 months in advance the termination date. Therefore, I find it very unlikely the Landlord's alleged change in circumstances impacted the decision to issue the Notice of termination.
16. While I accept that the Landlord moved into the rental unit shortly after the Tenants vacated, the Landlord only lived in the rental unit for 78 days. As set out above, if a landlord serves a N12 notice under section 48(1) of the Act, they are required to live in the rental unit for at least one year. As the Landlord lived in the rental unit for far less than one

year after the Tenant vacated, I find that this part of the test set out in section 57(1) has also been satisfied.

17. As such, I find that on the balance of probabilities the Landlord served the Tenants with a notice of termination in bad faith and violated section 57 of the Act. The T5 remedies will be addressed in the “Remedies” section below.

Remedies

18. The Tenants sought a rent abatement for \$24,629.00, representing 100% of the lawful monthly rent paid for 11 months. the Tenant testified that the following events were stressful;
- the Landlord attempting to negotiate with the Tenants to sign an N11 Notice of termination in December 2020
 - the Landlord giving a Notice of Termination (N12) on January 6, 2021 • the Tenants moving out of the unit on April 1, 2021
19. The Tenant’s led insufficient evidence to warrant a rent abatement. They did not provide any medical documentation supporting their testimony about the impact of the circumstances on the Tenants’ health or well-being. Moreover, the Tenant moved out on the presumption of a good faith issuance of the N12 and had the opportunity to remain in the unit and bring the matter to the Board but chose not to do so. Therefore, I find that a rent abatement of is not appropriate in the circumstances.
20. At the hearing the Tenants submitted into evidence records of their tenancy agreements and rent payments at the rental unit at issue in this application and their accommodation after they moved out of the rental unit. The Tenants temporarily occupied 125 Walter St. from April 3, 2022 to June 30, 2022 while they searched for a more suitable residence, and then lived at 59 McFarlane Drive from July 1, 2022 forward. Noting that the new rent was the same at both of these units, the Tenants evidence demonstrated the difference in rent between the two units and the unit at 183 Chandros Drive was \$660.40 per month. Therefore, I find that the Landlord must pay the Tenants \$7,924.80 for the increased cost of rent that the Tenants have incurred for a one-year period after the Tenant moved out of the rental unit.
21. The Tenants requested that the Board grant a reimbursement of expenses related to moving and storage. The Tenants submitted documentation from Grand River Moving detailing moving expenses, as well as storage expenses for during the period when the Tenants resided in the temporary accommodations, and testified they had no choice but to place their items in storage due to their circumstances and limited space in their temporary accommodations. The Tenants are entitled to moving and storage costs, as these costs were a direct consequence of the Landlord serving the Notice of termination in bad faith. Therefore, I find that the Landlord must pay the Tenant \$4,221.30 for the reasonable outof-pocket moving, storage and other like expenses that the Tenants have incurred as a result of having to move out of the rental unit.

22. The Tenants sought an order for the Landlord to pay a fine. I am not satisfied that it is appropriate to order the Landlord to pay a fine to the Board in this application. An administrative fine is a remedy to be used by the Board to encourage compliance with the Act and is not normally imposed unless a landlord has shown a blatant disregard for the Act and other remedies will not provide adequate deterrence and compliance. In my view the remedies awarded in this order will sufficiently encourage the Landlord to comply with the Act.

It is ordered that:

1. The Landlord shall pay the Tenant is \$12,199.10. This amount represents:
 - \$7,924.80 for increased rent the Tenants incurred for the one-year period after they vacated the unit.
 - \$4,221.30 for the reasonable moving, storage and other like expenses that the Tenants incurred as a result of having to move out of the rental unit.
 - \$53.00 for the cost of filing the application.
2. The Landlord shall pay the Tenants the full amount owing by October 3, 2023.
3. If the Landlord does not pay the Tenants the full amount owing by October 3, 2023, the Landlord will owe interest. This will be simple interest calculated from October 4, 2023 at 6.00% annually on the balance outstanding.

September 22, 2023

Date Issued

15 Grosvenor Street, Ground Floor
Toronto ON M7A 2G6

Greg Witt

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.