



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

Citation: Brennan v Johnston, 2023 ONLTB 59370

Date: 2023-08-31

File Number: LTB-L-003458-23

In the matter of: 1138G POINT ROAD
WHITE LAKE ON K0A3L0

Between: Kaitlin Brennan Landlord

And

Kimberly Johnston Tenant
Kelly Johnston

Kaitlin Brennan (the 'Landlord') applied for an order to terminate the tenancy and evict Kimberly Johnston and Kelly Johnston (the 'Tenant') because:

- the Landlord in good faith requires possession of the rental unit for the purpose of residential occupation for at least one year.

The Landlord also claimed compensation for each day the Tenant remained in the unit after the termination date.

This application was heard by videoconference on June 1, 2023.

The Landlord's legal representative, Kaitlin Brennan, and the Landlord attended the hearing.

The Tenant's legal representative, Linda Tranter, and the Tenant attended the hearing.

Determinations:

4. On July 27, 2022, the Landlord gave the Tenant an N12 notice of termination with the termination date of September 30, 2022. The Landlord claims that they require vacant possession of the rental unit for the purpose of residential occupation by Landlord.

Preliminary Issue: Compensation Not Paid

5. The Landlord's legal representative submits the Landlord paid the Tenant the required compensation in the form of a cheque that the Landlord issued from a prior N12 notice.

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The cheque was issued on March 25, 2021 for the prior N12 with a termination date of September 30, 2021. The Landlord's legal representative submits the Tenant did not cash the cheque, although the cheque was delivered to the Tenant.

6. The L2 application based on the prior 12 notice, for which the Landlord issued the prior compensation cheque was dismissed and the hearing Member did not issue an order decision on the compensation.
7. The Landlord's legal representative submits that the fact that the compensation was not raised at the last hearing, speaks to the fact compensation was provided for them, but Tenant never raised that issue because the Tenant received it.
8. Since the Landlord's prior application was dismissed, the Landlord served the Tenant with another N12 notice for which this L2 application is based on and is relying on the prior compensation cheque as compensation paid.
9. The Landlord's legal representative submits the Landlord is still in possession of a second cheque for the N12 notice on the day of the hearing, for which this application is based on, but the Landlord did not think it necessary to issue another cheque for compensation on the new N12 notice.
10. The Tenant's legal representative submits the Tenant never received the first cheque for the first N12 notice, and so there was no compensation paid to begin with.
11. The Tenant's legal representative submits that the member did not address the compensation cheque one way or the other but the fact remains the Tenants were not compensated.

The Act and Analysis

12. Section 48 of the Act states:

Notice, landlord personally, etc., requires unit

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;...

13. Compensation, notice under s. 48

48.1 A landlord shall compensate a tenant in an amount equal to one month's rent or offer the tenant another rental unit acceptable to the tenant if the landlord gives the tenant a notice of termination of the tenancy under section 48.

14. Findings of Board

202 (1) In making findings on an application, the Board shall ascertain the real substance of all transactions and activities relating to a residential complex or a rental unit and the good faith of the participants.

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15. The determinative issue before me is whether the Landlord met his obligation to provide the Tenant with compensation pursuant to section 48.1.
16. On any application before the Board the party making an allegation has the onus of proving that allegation on a balance of probabilities. That means the Landlord here must lead sufficient evidence to establish it is more likely than not the Landlord provided the Tenant with the required compensation.
17. On a balance of probabilities means the Landlord must show that his version of events is the more probable and should succeed. Saying something is proven on a balance of probabilities simply means that it is more likely than not to have occurred. It means that it is probable, i.e., the probability that some event happened is more than 50%--indeed, 50.1% is sufficient. In all cases, the decision maker must weigh up the evidence and decide which version is most probably true. Consequently, the real truth may never be known. All that can be done is to decide which of the parties has presented the most probable version.
18. The Landlord is relying on a previous cheque he issued on a prior N12 notice to use as compensation for this application. The Landlord's legal representative submits the Landlord issued that cheque to the Tenant on March 25, 2021. The application was dismissed due to an error. The Landlord then served the Tenant with a new N12 notice served on July 27, 2022, more than one year after the initial N12 notice and is relying on the cheque dated March 25, 2021 as compensation.
19. I believe that one of the purposes of the requirement, when an N12 notice is served, to pay one month of compensation to a tenant on or before to the termination date is to ensure that the tenant has funds to enable the move. Once the tenant receives the N12 notice of termination, he or she has the choice to move on or before the termination date and if the tenant receives compensation, the tenant has funds to facilitate the move. If the landlord fails to pay compensation by the termination date, the tenant does not have these funds for the move and so may not have a realistic choice to move. In other words, the failure to pay compensation on time may frustrate the tenant's choice. In recognition of this, landlords should be held strictly to the deadline for payment in s.55.1 of the Act.
20. Further, I note the Landlord failed to indicate on this L2 application that compensation had been paid, meaning he gave no indication to the Tenant he was using the prior cheque as compensation and so the Tenant would have no reason to think the Landlord had fulfilled his obligation under the Act. At the hearing the Landlord's legal representative submitted that the Landlord intended to use the prior compensation on the N12 notice for this application, however, the Tenant would have had no knowledge of the Landlord's intent until this submission was made at the hearing.

21. Further the Landlord's legal representative submitted the Landlord was holding the second cheque for compensation for this N12 notice on the day of the hearing. Given the prior submission the Landlord was relying on the first cheque as compensation, I am not satisfied that this was the Landlord's intention, otherwise there would be no need for a second cheque.
22. While I am not making a finding on if the Tenant received the cheque for the prior N12 notice, I note that even if they did receive it, and it wasn't cashed as the Landlord claims, that cheque would be stale dated. In my view, the Landlord would know this and I find it reasonable for the Landlord to expect to replace that cheque since the Tenant could not have cashed it to use on the N12 notice in this application.
23. Nonetheless, whether the Tenant received a cheque and didn't cash it, or never received it on the prior N12 notice, is a moot point, since the Landlord did not make his intentions clear to the Tenant. While there is nothing in the Act that prevents a Landlord from using the compensation on a prior notice to be applied to another notice in the future, I must consider section 202(1) of the Act, and consider whether the Landlord was obligated to notify the Tenant of his intent to use the prior compensation for this N12 notice in this application. In my view, the Landlord had an obligation to make the Tenant aware of his intent to use the prior cheque and he failed to do so prior to the termination date on the N12 notice. In my view the Landlord has not met the requirements of the Act by not informing the Tenant that understood compensation had been paid.
24. The obligation for the Landlord to make the Tenant aware of any intention to use a prior form of compensation on a future N12 notice, is similar to when a Landlord is giving the Tenant a notice (N12 or N13) and is required to compensate a Tenant, and chooses to do so by waiving the rent, and the Landlord has an obligation to inform the Tenant of the compensation intent. This approach is consistent with Board orders that find compensation is not paid where a Landlord waives one month of rental arrears but does not communicate the waiver to the Tenant.
25. All this leads me to the conclusion that while the Landlord may hold the view that compensation was paid, in my view there is an obligation to make the Tenant aware of the Landlord's intent.
26. With the evidence before me and on a balance of probabilities, I find the Landlord did not compensate the Tenant pursuant to section 48.1 of the Act and the Landlord's application must be dismissed.
27. 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.
28. This order contains all reasons for the determinations and order made. No further reasons will be issued.

It is ordered that:

1. The Landlord's application is dismissed.

August 31, 2023

Date Issued

Greg Brocanier

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.