



Order under Subsection 30 Residential Tenancies Act, 2006

Citation: Kitwana & Adeoye v Sun & Xu, 2023 ONLTB 59140

Date: 2023-08-31

File Number: LTB-T-005931-23

In the matter of: 65 PATRICK DR
WHITBY ON L1R2L3

Between: Iphigenia Kitwana Tenant
Olumide Adeoye

And

Ru kai Sun Landlord
Yuan Xu

Iphigenia Kitwana and Olumide Adeoye (the 'Tenant') applied for an order determining that Ru kai Sun and Yuan Sun(the 'Landlord') failed to meet the Landlord's maintenance obligations under the *Residential Tenancies Act, 2006* (the 'Act') or failed to comply with health, safety, housing or maintenance standards.

This application was heard by videoconference on May 30, 2023.

The Tenant's legal representative, Neto Naniwambote, and the Tenants (IK) and (OA), attended the hearing.

A witness for the Tenant, Sonny Malik, an employee of Ont Restoration Services, also attended the hearing.

Determinations:

Preliminary:

1. The Tenant's legal representative requested an amendment to the Tenant's application. The Tenant's legal representative requested the following amendments:
 - Change the last name of the second named Landlord from Yuan Sun, to Yuam Xu.

- Change the Landlord's mailing address from 65 Patrick Dr. Whitby, ON L1R 2L3(the rental unit address) to 105 Main Street, 2F, Markham, ON L3R 2G1
2. The Board's Guideline 15 on amending applications requires the requestor to make the amendment request as follows:
 - a) in writing;
 - b) served with the amended application to all other parties; and
 - c) filed with LTB with the amended application and a completed Certificate of Service.

3. Guideline under 15.3 that states:

The request to amend will be decided at the hearing after considering:

- a) whether the amendment was requested as soon as the need for it was known;
 - b) any prejudice a party may experience as a result of the amendment;
 - c) whether the amendment is significant enough to warrant any delay that may be caused by the amendment;
 - d) whether the amendment is necessary and was requested in good faith; and
 - e) any other relevant factors.
4. The Tenant's legal representative submitted the amendment request pursuant to the Board's Guidelines in writing in advance of the hearing. As the request is merely a clerical amendment, I see no prejudice to the Landlord in granting the amendment.
 5. The Tenant's application is amended in the style of cause to reflect the amendment.

Tenant's T6 Application

6. The Tenant submitted the application to the Board on January 18, 2023.
7. The Tenant moved into the rental unit on August 22, 2022 and vacated the rental unit December 9, 2022.
8. The rental unit is a detached house, with four bedrooms, on suite master bathroom, and a second full bathroom on the second floor. The main floor is comprised of a kitchen, living room / dining room, 2 piece bathroom and laundry. The basement is unfinished.

9. In the Tenant's T6 application the Tenant claims the Landlord failed to meet the Landlord's maintenance obligations under the *Residential Tenancies Act, 2006* (the 'Act') or failed to comply with health, safety, housing or maintenance standards as a result of the rental unit containing black mold.

10. Section 20(1) of the Act states as follows:

A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.

11. 24. In *Onyskiw v. CJM Property Management Ltd.*, [2016 ONCA 477](#), the Court of Appeal for Ontario rejected the position that a landlord is automatically in breach of its obligation to maintain and repair under subsection 20(1) as soon as an interruption in service occurs or the unit is in need of repair. The Court addressed the competing approaches taken, in the jurisprudence, to s. 20 maintenance applications and prefers the contextual approach. While a lease is properly treated as a contract, breach of the terms/duty to maintain/repair will not automatically result in a finding of liability. The Court found that the reasonableness of a landlord's response and conduct to the maintenance issue(s) is a factor in deciding breach and/or remedy and that this is consistent with the Board's Interpretation Guideline #5. Clearly, *Onyskiw* represents a departure from the idea of a landlord's strict contractual liability as espoused, in part, by the Divisional Court in *Offredi v. 751768 Ontario Ltd.*, 1994 CanLII 11006 (ON SCDC), [1994] O.J. No. 1204 (Div. Ct.).

12. IK testified that after moving in to the rental unit, a neighbour approached her on August 26, 2022 and asked if the Landlord had removed all the mold. IK submits she mentioned to the neighbour she and OA had been experiencing breathing issues since moving in to the rental unit.

13. The same day IK spoke to the neighbour IK went to the basement to investigate the presence of mold and found evidence of black mold in the insulation and on the wood frame. IK texted the Landlord inquiring as to the mold, and the Landlord responded the same day telling IK if she gets someone to get rid of the mold, the Landlord will reimburse IK for the costs.

14. On August 28, 2022 the Landlord calls the Tenant and tells the Tenant that he will take care of the mold in the basement.

15. To support the Tenant's claims, the Tenant submitted photo evidence of black mold in the basement area of the house specifically, in black mold can be seen on the insulation between the downstairs wall studs and on the wood studs.

16. IK testified the Landlord attended the unit on September 8, 2022 to pick up post dated rent cheques, and went to the basement to address the mold issue. The Landlord informed the Tenant there was no mold and left the rental unit.

17. On September 10, 2022 IK texted the Landlord and informed the Landlord she was not satisfied the mold issue had been rectified, and informed the Landlord she did a home mold air test that indicated levels of mold in the air of the rental unit.
18. The Landlord replied to IK the same day and informs IK he will send some people over to look at the mold issue and also states but he has never had an issue with mold in the rental unit before.
19. On September the 10th 2022 the landlord texted IK that he would be coming to the house on September the 12th 2022 with some people to remove the mold.
20. On September 12, 2022 the landlord attended the rental unit with a professional mold company and tenants were instructed to vacate the rental unit for 12 hours. Upon returning to the rental unit IK claims that they were experiencing breathing issues and decided to perform another home test for mold.
21. On September 29th the landlord hired a professional air quality company to perform a lab test for the presence of mold in the rental unit. The company hired by the landlord produced results that stated there were small traces of mold in the air but they were not hazardous to the health of the tenants.
22. On October 12, 2022 the tenants hired Ont Restoration Services, an air quality company to perform their own test. On October 21, 2022 the tenants received a report with the results for the test performed by Ont Restoration Services, that the mold levels in the house were dangerous and the house was not habitable due to the high levels of mold.
23. To support their claim the tenants submitted documentary evidence in the form of the air quality test results.
24. The Tenant's witness, SM testified that upon arriving at the rental unit he performed an inspection of the area with mold and he concluded that there was black mold in the insulation material, due to prior water damage. SM also testified it appeared as if someone tried to remove the material affected by the mold but did not do a thorough job.
25. SM testified that the tenant hired Ont Restoration Services to collect the samples of mold but SM's company did not perform lab testing on the collected samples. SM testified that Ont Restoration Services uses a company by the name of Oshtech to perform the lab testing.
26. SM further testified that because he was not the lab technician that performed the test he could not speak directly to the results however being a professional in the mold removal industry he submitted that when there are levels present as high as indicated on the tenants results he recommends to hire a professional company to remove and clean the unit of all the mold.
27. I questioned SM with respect to the levels of mold present in the Tenant's rental unit and asked if the house was livable. SM testified that his job was merely to collect the samples and provide the report back to the Tenant's. SM further testified that he is no doctor and

would comment or speculate on the impact the high levels recorded would have on the Tenant's health, but SM stated that being a professional in the industry, he himself would not live in a house with such high mold spore levels.

28. IK testified that throughout the period of time the Tenant's were dealing with the mold issue they were experiencing health issues related to the "hazardous environment" they lived in.
29. The Tenants claim they could no longer stay in the rental unit and were forced to vacate December 9, 2022 to find more suitable housing as the Landlord failed to resolve the mold issue.
30. With the uncontested evidence before me and on a balance of probabilities I find the Landlord has failed to meet their obligations under s.20(1) of the Residential Tenancies Act, 2006 (the 'ACT').

Remedies

31. The Tenant was seeking an abatement of rent and an order terminating the tenancy.
32. An abatement is a contractual remedy. It recognises the idea that a tenant is paying rent for a bundle of goods and services and if the tenant is not receiving everything being paid for then he is entitled to abatement proportional to the difference between what is being paid for and what is being received. There is no guidance in the Act to assist the Member in determining the amount of an abatement of rent. The Board's Interpretation Guideline 5 provides some guidance on rent abatement. In determining the amount to be ordered, the Member will consider the period of time that the problem existed and the severity of the problem in terms of its effect on the tenant. The test should be the impact on the average tenant or the impact a reasonable person would expect this problem to have had on a tenant.

Unused rent money for post dated cheque for eight months: \$5,043.56

33. The Tenant requested an order from the Board ordering the Landlord to pay the Tenant the portion of unused rent for the days after the Tenant vacated the rental unit. The Tenant paid for four months of rent in full prior to moving into the rental unit. The Tenant submitted a money order in the amount of \$11,800.00 for an advance rent payment of four months. The Tenant is requesting an abatement for the unused portion of the rent and claims they had to move out due to the health conditions caused by the mold.
34. The calculation of daily compensation due the Tenant for the days after the Tenant vacated the rental unit is calculated as follows:

$\$2,950 \text{ (rent)} \times 12 \text{ (months)} / 365 \text{ (days)} = \96.99 per day

The Tenant vacated the rental unit on December 9, 2022 leaving 22 days left in the month. The Tenant shall receive a rent abatement in the amount of \$2,133.78, calculated as follows:

$2 \text{ (days)} \times \$96.99 = \$2,133.78$

Key deposit: \$300.00

35. The Tenant requested an order from the Board ordering the Landlord to pay the Tenant the amount of \$300.00 which represents the key deposit the Tenant claims they paid the Landlord. The Tenant submitted as evidence, a copy of a cheque provided to the Landlord in the amount of \$300.00, however, the Tenant failed to produce any evidence the Landlord had cashed the cheque. In the absence of any bank statement from the Tenant showing the Landlord cashed the cheque, I am unable to conclude the Landlord owes the Tenant this money. Nonetheless I will address this in the "It is ordered" section of this order.

Difference in current rent \$10,090.56

36. The Tenant requested an order from the Board ordering the Landlord to pay the Tenant the difference in rent the Tenant assumed when the Tenant vacated the rental unit due to the mold issue. The Tenant failed to submit any evidence to support their request to support their claim for this remedy, and in the absence of such evidence the Tenant's request is denied.

Average income loss for IK (worked from home): \$5,000.00

37. The Tenant failed to submit any evidence to support their request the Board issue an order for the Landlord to pay the Tenant for lost wages as a result of IK not being able to run her business out of her house due to the mold issue. In the absence of such evidence the Tenant's request is denied.

Movers in: \$1,600.00

38. The Tenant requested an order from the Board ordering the Landlord to pay the Tenant out of pocket costs for their moving expenses to move into the rental unit. This cost being claimed by the Tenant's is not related to their claim in the application. Further in my view,

moving expenses incurred by the Tenant, are a normal cost associated with moving into a new rental unit and therefore the Tenant request for this remedy is denied.

Moving out: \$2,000.00

39. The Tenant requested an order from the Board for the Landlord to pay the Tenant out of pocket costs for their moving expenses to move out of the rental unit. This cost being claimed by the Tenant, in my view is a normal cost associated with moving from a rental unit. In my view, the Tenants would have incurred this cost had they moved at the end of the tenancy agreement, had there been no mold issue, and I consider this to be a normal cost incurred by Tenants associated with moving from a rental unit, and therefore the Tenant's request for this remedy is denied.

Mold test by company: \$536.75

40. The Tenant requested an order from the Board ordering the Landlord to pay the Tenant in the amount of \$536.75 for out of pocket costs they incurred to pay to have a mold test performed. While the Tenant did not submit a receipt indicating they had paid the invoice, I accept the Tenant's testimony as credible that the invoice was paid. This portion of the Tenant's claim for remedies is granted.

Self / Home Mold test kit: \$51.96

41. The Tenant requested an order from the Board ordering the Landlord to pay the Tenant for the out of pocket costs for the home mold test kit the Tenant claims they purchased. The Tenant failed to submit any evidence to support their request and in the absence of such evidence the Tenant's request is denied.

Issues Not Identified in the Tenant's Application

Landscape: \$2,200.00

42. The Tenant requested an order from the Board ordering the Landlord to pay the Tenant for out of pocket landscaping costs. The Tenant did not identify this maintenance issue in the T6 application, and did not provide any documentary evidence to the Board to support this claim. For the reasons above, the Tenant is not eligible for this request for remedy and therefore the Tenant's request for out of pocket landscape costs is denied.

Cleaning and painting: \$2,200.00

43. The Tenant requested an order from the Board ordering the Landlord to pay the Tenant for out of pocket cleaning and painting costs. The Tenant did not identify this maintenance issue in the T6 application, and did not provide any documentary evidence to the Board to support this claim. For the reasons above, the Tenant is not eligible for this request for remedy and therefore the Tenant's request for out of pocket cleaning and painting costs is denied.

Cost of legal representation

44. The Tenant requested an order from the Board ordering the Landlord to pay the Tenant for out of pocket expenses they incurred to hire a legal representative.

Interpretation Guideline 3:

Costs

A Member has the discretion to require a party, a party's agent or a party's legal representative to pay, as costs, any representation or preparation expenses of another party where the conduct of the party, a party's agent or a party's legal representative was unreasonable. Conduct is unreasonable if it causes undue expense or delay...

Other Costs

A party who wants to claim costs in addition to the application fee should be prepared to speak to the matter and to provide support for the claim. The other party will also be allowed to make submissions on the issue.

While the Board may order a party to pay the costs of another party, costs to a successful party for the preparation/representation fees paid to a legal representative are generally only awarded in cases of unreasonable conduct set out below. Similarly, the Board will generally only allow costs for other expenses incurred by the successful party (e.g., travel, expert reports, etc.) where there has been unreasonable conduct by the opposing side.

45. Given the Board's Interpretation Guideline 3 on costs, the Tenant did not provide any evidence the opposing party's conduct was unreasonable. In the absence of any evidence

to support the Tenant's claim for the cost of the Tenant's legal representative's legal fees, this remedy request is denied.

46. 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.
47. This order contains all reasons for the determinations and order made. No further reasons will be issued.

It is ordered that:

1. The tenancy is terminated on December 9, 2022.
2. The Landlord shall pay to the Tenant abatements totalling \$2,670.53 which represents the portion of unused rent and the cost of the mold inspection test.
3. If the Landlord is still in possession of the Tenant's \$300.00 cheque for the key deposit, then the Landlord shall return the cheque. If the Landlord has cashed the Tenant's cheque for the key deposit the Landlord shall pay to the Tenant the amount of \$300.00 on or before September 11, 2023.
4. If the Landlord does not pay the Tenant the full amount owing on or before September 11, 2023, the Landlord will start to owe interest. This will be simple interest calculated from September 12, 2023 at 6.00% annually on the balance outstanding.

August 31, 2023
Date Issued

Greg Brocanier
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.