



Order under Section 57 Residential Tenancies Act, 2006

Citation: Berry v Clark, 2023 ONLTB 56707

Date: 2023-08-29

File Number: LTB-T-048704-22

In the matter of: 18 Sympatica Crescent
Brantford Ontario N3P1G4

Between: Brittany Berry
Erin Bettis Tenants

And

John Clark Landlords
Karen Reynolds

Brittany Berry and Erin Bettis (the 'Tenants') applied for an order determining that John Clark and Karen Reynolds (the 'Landlords') gave a notice of termination in bad faith.

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

The Landlords and the Tenants attended the hearing. The Landlords were represented by C. Boyed and the Tenants represented themselves.

Preliminary Issues:

Legal Counsel: On the morning of the hearing, the Tenants advised that they wanted to speak to TDC and that they would prefer to hold the matter down until one became available. The hearing was held down and was heard at 10:36am. When asked, the Tenants advised that they did not seek legal counsel prior to the hearing as that they hoped to have the opportunity to do so at the hearing. On review of the Boards file, we note that the Tenants' application was filed in August 2022 and that a copy of the Notice of Hearing was received by the Tenants in mid-June 2023. we therefore find that the Tenants had more than sufficient time to seek legal advice prior to the hearing date but chose not to do so, as such, we proceeded with the hearing.

Determinations:

1. The issue to be determined by the Board is whether the Landlords gave the Tenants a notice of termination in bad faith. For the reasons that follow, we find that the Tenants did not prove the allegations contained in the application on a balance of probabilities. Therefore, the application is dismissed.

Background

2. The residential complex is a one story building with a basement. The property has two self-contained units with their own kitchen and bathroom, the main floor has two bedrooms and the basement has one bedroom.
3. Although the property has two self-contained units with each tenant taking ownership of each, it was agreed that the Tenants held one single lease together for the entire property.
4. It was uncontested that the Landlord provided the Tenants with an N12 Notice of Termination for own use. It was the Tenants testimony that when the Landlords served the N12 notice, the Landlord J. Clark stated that it was due to his deteriorated relationship with Ms. K. Reynolds, which necessitated him moving into the rental unit for his own use.
5. It was agreed that the Tenants signed an N11 notice to terminate the Tenancy after receiving an N12 notice with a termination date of November 30, 2021 for personal use of the property by the Landlord, and vacated the property on November 13, 2021.
6. It was uncontested that in July of 2022 the Landlords re-rented the basement or lower unit of the rental unit to P. Vanderveer ('PV').
7. It is the Tenants position that the Landlord acted in bad faith as they do not believe that there was ever a deterioration of the Landlord's relationship causing him to leave his former home and it was also bad faith because it was uncontested that a new tenant, PV moved into the basement portion of the rental unit in July 2022.
8. The remedies requested by the Tenants in their application are: \$12,600.00 for rent differential, \$749.19 in moving expenses, \$15,000.00 in general compensation, the \$53.00 application filing fee and any remedy the Board feels appropriate.
9. The Tenants submitted that there is a presumption of the Landlords' bad faith, as it was agreed that the rental unit was re-rented to P Vanderveer, 8 months after the Tenants vacated the unit.

Legislation & Analysis

10. Section 57 of the *Residential Tenancies Act, 2006* (the 'Act') provides tenants with a remedy if a Landlords gives a notice of termination in bad faith, the former tenant vacates the rental unit as a result of the notice, and the person who is supposed to occupy the unit does not do so within a reasonable time after the former tenant vacates.

Bad Faith Allegation

11. On an application to the Board, the person who alleges a particular event occurred has the burden of proof to establish that it is more likely than not that their version of events is true. In this application, the burden typically falls on the tenant to establish that the notice of termination was served in bad faith.

12. Subsections 57(5) and 57(6) of the Act establish a rebuttable presumption of bad faith on the following ground:

57(5) For the purposes of an application under clause (1)(a) and (c), it is presumed, unless the contrary is proven on a balance of probabilities, that a Landlords gave a notice of termination under section 48 in bad faith, if at any time during the period described in subsection (6) the Landlords,

...

(b) enters into a tenancy agreement in respect of the rental unit with someone other than the former tenant;

...

57(6) The period referred to in subsection (5) is the period that,

(a) begins on the day the Landlords gives the notice of termination under section 48; and

(b) ends one year after the former tenant vacates the rental unit.

13. On the basis of the uncontested evidence before us, we find that the Landlords served the Tenants with an N12 notice of Termination and that the Tenants vacated the rental unit on the basis of that notice.
14. We also find, based upon, the agreed evidence, that the Landlord leased the lower portion of the rental unit to PV in July 2022, 8 months after the Tenants vacated pursuant to the termination notice, creating a rebuttable presumption that the Landlords served the N12 notice in bad faith. In other words, in this case, the burden falls on the Landlords to establish that they did not serve the notice of termination in bad faith.

Presumption of Bad Faith

15. As the Landlords re-rented the rental unit within 1 year of the Tenants vacating the property, section 57(5) of the Act shifts the burden to them to establish that there was good faith in the termination of the tenancy.
16. As noted above, the Landlords is presumed to have given the N12 in bad faith because he entered into a new tenancy agreement after the Tenants moved out. However, for the reasons that follow, we find that the Landlords have rebutted the presumption and established that the N12 was not given in bad faith.
17. The Landlord J. Clark (JC) disputed the application of the presumption of bad faith. He testified that at the time the Notice of Termination was given to the Tenants, he had full intention of residing in the rental unit as his relationship with his common-law-spouse, Ms. Reynold deteriorated in February 2021, and they had decided that he would leave their shared home and move into his own home, the rental unit.
18. The Landlords testified that while JC waited for the Tenant's to vacate, he continued to live with Ms. Reynolds, at her 5 Brian Crest home in a separate bedroom and that because the Tenants vacancy date was taking long, Ms. Reynolds sold 5 Brian Cres and purchased 86

Mission Rd in Brantford, where JC also moved to, but lived separately from Ms. Reynolds, in the basement.

19. When the Tenants questioned the Landlords as to why they were still spending time together after the breakup, Ms. Reynolds testified that JC has a great relationship with her children, throughout their long-term relationship, since they were 9 years old and is a father figure for her daughters.
20. The Landlords further testified that Mr. Clark moved into the rental unit at the end of November 2021 as he needed time to repair some damage left by the Tenants and that he moved his items into the rental unit gradually, by van and car.
21. JC testified that he did move in and resided in the rental unit, his car was parked there and that after some time there was a change in his circumstances as and Ms. Reynolds reconciled their relationship sometime between February 15-20, 2022 and he moved back to Mission Road with Ms. Reynolds after that date.
22. JC testified that he continued to use the upstairs unit as an office after February 2022 and that the basement unit was left vacant from February 2022 to July 2022 when Ms. Vanderveer was rented the unit. Ms. Reynolds also provided evidence and confirmed the statements made by Mr. Clark.
23. The Tenant testified that they did not believe that the Landlord John Clark separated from his partner and moved into the rental unit at any time. The Tenant testified that their two witnesses never saw lights on in the rental unit, did not see the Landlords' cars in the driveway and never saw the Landlord move in to take occupancy of the rental unit. On this basis, they believe the Landlord did not take possession of the rental unit within a reasonable period of time.
24. In support of their case, the Tenants provided witnesses who reside on the street of the rental unit, P.M Vanderveer ('PV') who moved into the basement unit of the property, J. Pedley ('JP') a next-door neighbour and R. Dibaldi ('RD') who is the superintendent of the apartment complex on the same street as the rental unit.
25. It was undisputed that PV moved into the property on July 1, 2022, and currently occupies the lower unit of the Tenants' rental unit and pay's \$1,300.00 a month in rent.
26. RD testified that she lives at 18 Sympatica Cres for 12 years. She stated that she has never spoken to the Landlords but is aware that the Landlords drives a gold SUV and a red van and that until PV moved into the lower unit there were never any lights on at the property and no vehicles were parked in the driveway overnight and or on weekends. In cross examination, RD advised that it was possible that the Landlords could have moved in while she was at work or while she was not looking out the windows. JP testified that he is a Superintendent of a residential complex located at 15 and 17 Sympatica Cres and also resides in a unit at 15 Sympatica, which does not face the rental unit. He testified that he can see the rental unit from across the street from the inside of other residents' units, when he is in those units performing his work duties or performing landscaping. He testified that from November 2021 to July 2022, no one lived on the property as there were no cars

parked overnight and the lights were on in the property; and that when it snowed, the driveway did not appear to have been driven on, there were never any tire tracks. In cross examination, JP advised that he does not see the rental unit at night and he was unable to provide dates of when he noted the lights were off in the unit or when snow had or had not been removed from the property. He also stated that it was possible for the Landlord to move into the property when he was not looking at the property.

27. We are satisfied on a balance of probabilities that the Landlords had a genuine good faith intention to occupy the rental unit when they served the Tenants the N12 notice. We are persuaded by the Landlord's evidence that he intended to move into the rental unit because he and his common law partner had separated. We further accept his evidence that he moved into the unit shortly after the Tenants vacated and moved out in February 2022 when he reconciled his relationship with K. Reynolds and after that time as he had moved back in with Ms. Reynolds, he rented out the basement part of the unit in July 2022.
28. We find that there is sufficient evidence that rebuts the presumption of bad faith as there was a change of circumstances in the Landlord's life which led to him vacating the rental unit, after he moved in, and led to him renting the basement of the unit to another Tenant. We find that the Tenants failed to provide evidence that established a bad faith intention or that failed to rebut the Landlords' evidence regarding the change of life circumstances.
29. Therefore, the burden of proof remains with the Tenants to establish that the requirements of s. 57(1)(a) of the Act have been met.

Subsection 57(1)(a) Tenants' Burden of Proof

30. As the rebuttable presumption has been successfully addressed by the Landlord, it is the Tenants' obligation to prove on a balance of probabilities the 3 elements contained in subsection 57(1)(a) of the Act, as outlined above.
31. The second and third elements of subsection 57(1)(a) are uncontested; the parties agree that the Tenants moved out due to the N12 notice and it was uncontested that the Landlord re-rented the rental unit, due to a change of life circumstances.
32. The burden is on the Tenants to establish the first element of subsection 57(1)(a), that the Landlord gave the N12 notice in bad faith.
33. For the reasons set out above, and based on the evidence before us, we find the evidence of the Landlord to be straightforward, detailed and consistent; the evidence was presented without hesitation and was credible that there was a relationship breakdown that initiated the request to recover possession of the rental unit. We find that the Landlords' explanations were reasonable and on a balance of probabilities that the Landlords provided the N12 notice in good faith but that circumstances legitimately changed.
34. As the Tenants did not establish the bad faith of the Landlords in serving the N12 notice, the application must be dismissed.

It is ordered that:

1. The Tenants application is dismissed.

August 29, 2023
Date Issued

Mayra Sawicki
Member, Landlord and Tenant Board

Nicola Mulima
Vice Chair, Landlord and Tenant Board

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If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.