



Order under Section 69  
Residential Tenancies Act, 2006

Citation: 1319399 Ontario Inc v Harry, 2023 ONLTB 56546

Date: 2023-08-16

File Number: LTB-L-043665-22

2023 ONLTB 56546 (CanLII)

In the matter of: 503, 360 TORRANCE ST  
BURLINGTON ON L7R2R9

Between: 1319399 Ontario Inc Landlord

And

Tara Harry Tenant

1319399 Ontario Inc (the 'Landlord') applied for an order to terminate the tenancy and evict Tara Harry (the 'Tenant') because:

- the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant;
- the Tenant, another occupant of the rental unit or a person the Tenant permitted in the residential complex has seriously impaired the safety of any person and the act or omission occurred in the residential complex.

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 January 18, 2023.

The Landlord's Agent, G. Gilmore and the Landlord's Legal Representative, M. Zarnett and the Tenant's Agent, N. Fijalkiewicz attended the hearing.

Bill Karl and Jayme Dawson attended as witness for the Landlord.

Determinations:

Preliminary Issue- Adjournment Request

1. The Tenant, T. Harry attended at the hearing after I asked N. Fijalkiewicz, the occupant and agent of Ms. Harry, to see if M. Harry could attend, as there was no record on file appointing Ms. Fijalkiewicz as agent.
2. T. Harry signed into the hearing at around 9:45 a.m., and advised me that she would not be participating in the hearing and she appointed Ms. Fijalkiewicz as her agent. T. Harry then disconnected from the call.
3. Ms. Fijalkiewicz requested an adjournment as she advised that she just retained Legal Representation the night before and advised that her legal representative told her to adjourn the matter as he was not available today. She submits that she has a previous representative, but she lost contact with that representative.
4. The Landlord was opposed to the request and submitted that this was a matter scheduled in an urgent block and the Landlord wanted to proceed today.
5. The request for adjournment was denied. Ms. Fijalkiewicz provided no documentation, such as a retainer, or emails from her previous representative and Ms. Fijalkiewicz could not even recall her name. It is fairly common in situations such as these, that if a representative that has been newly retained requires an adjournment in order to prepare for a hearing, they would send someone from their office to speak to the adjournment, or at the very least, provide a letter identifying themselves and the reasons for the request. Ms. Fijalkiewicz provided none of these things, therefore the request was denied.

### L2 Application

6. As explained below, the Landlord has proven on a balance of probabilities the grounds for termination of the tenancy. Therefore, the tenancy continues subject to the conditions below
7. The Tenant was in possession of the rental unit on the date the application was filed.
8. On July 18, 2022, the Landlord gave the Tenant an N5 and N7 notice of termination deemed served on July 23, 2022 with a termination date of August 18, 2022. The notices of termination contain the following allegations:
  - On April 20, 2022, the Tenant, or guests or occupants of the Tenant allowed their dog to defecate in the elevator of the residential complex.
  - On various dates between May 2022 and July 2022, there were complaints of smoke odor and/or noise emanating from the Tenant's unit.
9. J. Dawson appeared as a witness for the Landlord. She has lived in the building since March 2022. She testified that she lives beside the Tenant's unit.
10. The Tenant testified that prior to May 2022, the frequency of the noise and smoke coming from the Tenants unit was pretty much daily, typically every night and worse on the weekends. She testified that the noise and smoke emanating from the Tenant's unit has not stopped.
11. J. Dawson testified to various dates as outlined in the N5 notice of termination. On May 21, 2022, she testified that she was not able to sleep, her children kept waking up due to noise coming from

the Tenant's unit. She testified that she went to the Tenant's door and the Tenant slammed the door in her face.

12. She testified that there was a strong smell of smoke and noise coming from the tenants unit on June 6, 7, 11, and on July 12, 13, 16, 21, and 22<sup>nd</sup>. She describes the noise on these various occasions as mostly slamming of the door, and on some occasions, the dog barking. The noise usually ended late into the night and caused her and her children problems with either going to sleep or staying asleep. She testified that she doesn't smoke, and she knows the smoke coming from the Tenant's unit because her unit and the Tenant's unit are the only units on that end of the hallway and she can smell it in the hall as well.
13. Ms. Dawson testified that on July 28, 2022 between 6:00 p.m., until approximately 11:30 p.m., the Tenant's door was slamming about every 5 minutes, and her kids were running up and down the hallway.
14. Ms. Dawson testified that this same pattern of behaviour has continued with no change. She testified that the noise and the smell of smoke is constant, and it is worse on the weekends. She testified that she doesn't want to live in the unit anymore, but she can't afford to move.
15. B. Karl testified on behalf of the Landlord. He is a maintenance technician at the residential complex. He testified that he responded to a smoking complaint on June 28, 2022. He testified that he attended at the unit at approximately 10:12 p.m. He went in to the complainants unit, beside unit 503 and smelled cigarette smoke in that unit.
16. He testified that he has responded to a noise compliant on August 5, 2022. He testified that there was loud music and voices and screaming coming from the unit. He testified that as soon as he got off the elevator, he could hear the noise coming from unit 503. He knocked on the door and asked to speak to the occupant and he advised the occupant that he had received complaints regarding the noise. He asked her to cut down on the noise.
17. Mr. Karl testified that it could be possible that the smoke smell could be originating from other units since the complex is comprised of some smoking units, and some non smoking units.
18. G. Gilmore testified that he is the property manager at the residential complex. He testified that the residential complex is a 16 story building comprised of 175 rental units.
19. He testified that the tenancy with unit 503 began on January 1, 2021. The Tenant on the lease is Tara Harry and to his knowledge, Ms. Harry lives in the unit with her step daughter, and her step daughters children.
20. Mr. Gilmore testified that he has received the majority of complaints from J. Dawson. He testified that the complaints received regarding the noise and smoke have been verified.
21. He testified that the complaints that were received regarding unit 503 had to do with noise, smell of cigarette and cannabis smoke, and setting off fireworks from the balcony.
22. He testified that he has continued to receive complaints regarding unit 503.
23. Mr. Gilmore testified that the tenancy agreement prohibits smoking in the unit or any common areas of the residential complex. A lease agreement was submitted, specifically the schedule that contains the smoking rules.

24. He testified that the Landlord is doing their best to reduce smoking in the building. As of 2018, all tenancy agreements include a no smoking clause. He testified that the Landlord is doing their best to provide a healthy and safe environment for all residents.
25. Mr. Gilmore requested that the tenancy be terminated.

Tenant's evidence

26. Ms. Fijalkiewicz is an occupant of unit 503. She testified that she is a smoker and that when she smokes, she smokes on the balcony. She testified that she can't deny that there was, on occasion, loud music coming from her unit, but the noise would coincide with a birthday party of one of her children.
27. With regard to the allegations of door slamming, Ms. Fijalkiewicz testified that she has made many maintenance requests with respect to her door not closing properly. She has been asking for it to be fixed for over a year. She testified that she had to use force in order to shut her door, but describes the noise that created as not slamming, but nudging.
28. Ms. Fijalkiewicz testified that on her floor there are other Tenants who are smokers and are not subject to a non-smoking clause in their agreements. She testified that it is not possible for the smoke from the balcony to penetrate her unit or surrounding units, however no explanation was given as to why not. She testified that she alternates between vaping and smoking.

Analysis

29. The N5 notice of termination was served pursuant to Section 64 of the Residential Tenancies Act, 2006 (the 'Act') states:

64 (1) A landlord may give a tenant notice of termination of the tenancy if the conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant is such that it substantially interferes with the reasonable enjoyment of the residential complex for all usual purposes by the landlord or another tenant or substantially interferes with another lawful right, privilege or interest of the landlord or another tenant.

(2) A notice of termination under subsection (1) shall,

- (a) provide a termination date not earlier than the 20th day after the notice is given;
- (b) set out the grounds for termination; and
- (c) require the tenant, within seven days, to stop the conduct or activity or correct the omission set out in the notice.

30. The N7 notice of termination was served pursuant to section 66 of the Act which states:

66 (1) A landlord may give a tenant notice of termination of the tenancy if,

- (a) an act or omission of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant seriously impairs or has seriously impaired the safety of any person; and
- (b) the act or omission occurs in the residential complex.

31. In regard to the N7 notice of termination, I am not satisfied that the Landlord has proven on a balance of probabilities that the actions of the Tenant amounted to serious impairment of safety, therefore the portion of the L2 application based on the N7 notice of termination is dismissed.
32. In regard to the N5 notice of termination, I am satisfied, on a balance of probabilities that the Tenant, an occupant or guest of the Tenant or occupant has substantially interfered with the reasonable enjoyment lawful right, privilege or interest of the landlord and other residents within the residential complex by causing excessive noise and by smoking in the rental unit.
33. I accept the evidence from the Landlord's witnesses regarding noise coming from the unit, specifically the evidence of Ms. Dawson. I do not accept that the only time any excessive noise came from the unit was as a result of a child's birthday party. The notice outlines several dates that excessive noise was heard, and Ms. Dawson testified to all those dates. Not all those dates were in relation to a birthday. I have no reason to question the veracity of Ms. Dawson's testimony or that of the property manager who testified to receiving multiple complaints regarding noise.
34. In regard to smoking, the Tenant testified that she does on fact smoke on the balcony of the unit, despite the provisions in the lease that prohibit smoking anywhere in the rental unit or any common areas. The balcony is a part of the rental unit.
35. I am further satisfied that the Tenant or occupant failed to void the N5 notice of termination within seven days of receiving the notice. As the N5 was served by mail, it was deemed served on July 23, 2022. The Tenant was required to cease or correct the conduct during the 7 day voiding period.
36. Evidence indicates that the Tenant, occupant or guest of the Tenant or occupant engaged in conduct similar to that outlined in the N5 notice of termination. More specifically, on July 28, 2022, between approximately 6:00 pm until approximately 11:30 pm, Ms. Dawson testified that loud noise, including the slamming of doors and kids running up and down the hallways and cigarette smoke smell.

#### Relief from eviction

37. The Landlord is seeking termination of the Tenancy.
38. The difficulty that I have with respect to section 83 considerations is that I must consider the Tenant's circumstances, not the circumstances of the occupant. The Tenant refused to participate in the hearing. The occupant testified that if the tenancy were to be terminated, the Tenant has a place to go. The Tenant is only at the unit 3 or 4 times a month. Even if I had relevant information regarding the Tenant's circumstances, I find it extremely unlikely that the tenancy could be saved by way of a conditional order. The occupant of the unit, who is the person responsible for the conduct, denies that any excessive noise was made other than

2 or 3 incidents involving birthday parties. It is unlikely, given that admission, that the conduct would change, when it is not first acknowledged.

- 39. In contrast, the testimony adduced from the affected Tenant, the Tenant that made the majority of the complaints, is that she no longer wishes to live in her unit due to the excessive noise and smoke coming from unit 503. She testified that the conduct complained of has not stopped or gotten any better, and it is constant.
- 40. For those reasons, the Tenancy is terminated. Due to the timing of the issuance of this order, I find it fair to delay the termination to September 30, 2023.

It is ordered that:

- 1. The tenancy between the Landlords and the Tenant is terminated as of September 30, 2023. The Tenant must move out of the rental unit on or before September 30, 2023.
- 2. The Tenant shall pay to the Landlord \$186.00 for the cost of filing the application.
- 3. If the Tenant does not pay the Landlord the full amount owing on or before September 30, 2023, the Tenant will start to owe interest. This will be simple interest calculated from October 1, 2023 at 6.00% annually on the balance outstanding.
- 4. If the unit is not vacated on or before September 30, 2023 then starting October 1, 2023, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
- 5. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlord on or after October 1, 2023.

August 16, 2023

Date Issued

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Emily Robb

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.

In accordance with section 81 of the Act, the part of this order relating to the eviction expires on April 1, 2024 if the order has not been filed on or before this date with the Court Enforcement Office (Sheriff) that has territorial jurisdiction where the rental unit is located.