Order under Subsection 87(1)
Residential Tenancies Act, 2006

Citation: 3248866 Nova Scotia Limited v Suter, 2023 ONLTB 54461
Date: 2023-08-08
File Number: LTB-L-040343-22

In the matter of:	22 Meadowhawk Trail West Gwillimbury ON L3Z0E6	
Between:	3248866 Nova Scotia Limited	Landlord
	And	
	Melissa Suter	Tenant

3248866 Nova Scotia Limited (the 'Landlord') applied for an order to terminate the tenancy and evict Melissa Suter (the 'Tenant') because the Tenant did not pay the rent that the Tenant owes (L1 application).

3248866 Nova Scotia Limited (the 'Landlord') applied for an order to terminate the tenancy and evict Melissa Suter (the 'Tenant') because:

- the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex has wilfully or negligently caused damage to the premises.

3248866 Nova Scotia Limited (the 'Landlord') also applied for an order requiring Melissa Suter (the 'Tenant') to pay the Landlord's reasonable out-of-pocket costs the Landlord has incurred or will incur to repair or replace undue damage to property. The damage was caused wilfully or negligently by the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex (L2 application).

This application was heard by videoconference on July 26, 2023.

The Landlord’s Legal Representative Ayaz Mehdi, the Landlord’s Representatives Hammad Asim and Nadia Hammad Asim and the Tenant attended the hearing.

Determinations:

L1 Application:

1. On March 25, 2022, the Landlord served the Tenant with an invalid Notice to End Tenancy Early for Non-payment of Rent (N4 Notice) which had a termination date of April 9, 2022. The N4 notice was invalid because the “rent paid” amount for the period of January 1, 2022 to March 31, 2022 was incorrect as it indicated nothing had been paid by the Tenant during that period of time. However, the Landlord’s Legal Representative submitted that

the Tenant made a rent payment on March 30, 2022 which was not reflected on the N4 Notice.

2. Section 43 of the *Residential Tenancies Act, 2006* (the '*Act*') states the following:

> 43(1) Where this Act permits a landlord or a tenant to give a notice of termination, the notice shall be in a form approved by the Board and shall,
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> (a) identify the rental unit for which the notice is given;
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> (b) state the date on which the tenancy is to terminate; and
>
> (c) be signed by the person giving the notice, or the person's agent.
>
> 43(2) If the notice is given by a landlord, it shall also set out the reasons and details respecting the termination and inform the tenant that,
>
> (a) if the tenant vacates the rental unit in accordance with the notice, the tenancy terminates on the date set out in clause (1)(b);
>
> (b) if the tenant does not vacate the rental unit, the landlord may apply to the Board for an order terminating the tenancy and evicting the tenant; and
>
> (c) if the landlord applies for an order, the tenant is entitled to dispute the application.

3. Further, section 59(2) of the *Act* states as follows:

> 59(2) The notice of termination shall set out the amount of rent due and shall specify that the tenant may avoid the termination of the tenancy by paying, on or before the termination date specified in the notice, the rent due as set out in the notice and any additional rent that has become due under the tenancy agreement as at the date of payment by the tenant.

4. The N4 Notice is invalid insofar as it did not indicate the correct amount of the rent owing by the Landlord. I have no jurisdiction to amend the N4 Notice and cannot issue an order based on an invalid N4 Notice.
5. After I found that the N4 Notice was invalid, the Landlord chose to proceed with the hearing for arrears of rent only under s.87(1) of the *Act* without the possibility of having this tenancy terminated based on these arrears of rent.
6. As of the hearing date, the Tenant was still in possession of the rental unit.
7. The lawful rent is $1,800.00. It is due on the 1st day of each month.
8. The rent arrears owing to July 30, 2023 are $37,800.00.

9. At the hearing, the Tenant does not dispute the amount of arrears owing and submits that the Landlord refused payments from Ontario Works Benefits which would have paid rent directly to the Landlord. The Tenant states that Ontario Works is holding onto the rent and that once they receive a notice or order from the Board, the funds will be released to the Landlord. No documentation was tendered at the hearing to collaborate the Tenant's submission.
10. The Landlord denies that he has refused any rent payments from Ontario Works. The Landlord Hammad Asim ('HA') states that he contacted Ontario Works and was advised that they would only pay $600.00 towards rent which would leave the Tenant to pay $1,200.00 as rent is $1,800.00 per month. HA stated that he informed Ontario Works that he would speak to the Tenant but when his wife subsequently contacted Ontario Works, they informed her that the Tenant was no longer with Ontario Works since July, 2022 therefore no rent payments would be forthcoming.
11. Based on the evidence and submissions before me, and on a balance of probabilities, I am satisfied, and it was also not disputed by the Tenant, that the rent arrears are now $37,800.00.
12. The arrears of rent claimed exceed the Board's monetary jurisdiction of $35,000.00. In accordance with section 207(3) of the *Act*, by pursuing this application before the Board, the Landlord cannot claim any arrears of rent in excess of $35,000.00 in a new application or before a Court of competent jurisdiction. The Landlord's Legal Representative voluntarily waived the portion of the claim that exceeds the Board's monetary jurisdiction.
13. The Landlord incurred costs of $186.00 for filing the application and is entitled to reimbursement of those costs.

L2 application:

14. The Landlord filed a L2 application with the Board on July 19, 2022.
15. The Landlord served the Tenant with a N5 notice of termination ('N5 Notice') on May 30, 2022. The N5 Notice stated a termination date of June 25, 2022 and claimed that the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex has wilfully or negligently damaged the rental unit or the residential complex.
16. The N5 Notice indicated that the Tenant could correct the problem by paying $12,000.00 to the Landlord which was the amount the Landlord estimated it would cost to repair the damaged property.
17. The Landlord then served a second N5 notice of termination on July 4, 2022 which had a termination date of July 20, 2022.
18. Rule 69 of the *Act* states that:

> (1) A landlord may apply to the Board for an order terminating a tenancy and evicting the tenant if the landlord has given notice to terminate the tenancy under this Act or the *Tenant Protection Act*, 1997.
>
> (2) An application under subsection (1) may not be made later than 30 days after the termination date specified in the notice.

19. The L2 application was filed before the remedy period indicated in the second N5 notice expired. Pursuant to subsection 69(2) of the *Act*, the Landlord was not entitled to file the second N5 notice as it was filed before the termination date.
20. Further, the Landlord's first N5 notice was given under subsection 62(1) of the *Act*. Pursuant to section 68(1)(b) of the *Act*, the Landlord was only entitled to issue a second non-voidable N5 notice under subsection 62(1) of the *Act* if the conduct occurs or a situation arises "more than seven days but less than six months" after the first N5 notice was given to the Tenant.
21. In this case, the substance of the Landlord's second N5 is not a further contravention but a continuation of the alleged contravention from the first N5. In order words, as nothing new occurred after the first N5 notice was given to the Tenant, the Landlord was not entitled to give the second non-voidable N5 and the Landlord's application cannot rely on the second N5 notice of termination.
22. However, since subsection 69(2) of the *Act* provides that there can be no application later than 30 days after the termination date specified in the notice and since the Landlord filed this application within 30 days of the termination date specified in the first N5 notice, the Landlord's L2 application can proceed on the basis of the first N5 notice.
23. The first N5 notice indicates that on April 5, 2022 at 10:00 a.m., the Landlord found out the Tenant had damaged the following in the rental unit:

    - Carpets and floors are damaged;
    - Dog has chewed carpet on stairs;
    - Paint and toilet are in bad shape;
    - Whole unit was dirty.

24. The N5 notice also indicates that the Tenant did not permit checking of two rooms within the rental unit and that the Landlord was unsure if any other damage existed. The Landlord's contractor estimated damage to be $12,000.00.
25. HA testified that he did not personally observe the aforementioned damage in the rental unit however, he had retained a home inspector and that person reported in an email communication on May 24, 2022:

    > I have attached invoice for 22 Meadowhawk Trail.

> Also just for your information the front step area was a mess. Lots of cigarette butts on concrete porch. Was really pretty disgusting. Would advise you to get that tenant out prior to selling. Place will need some work if front entrance is any indication of the rest of the house.

26. HA also stated that his property manager, Fazal Ahmed advised him of the damage that was in the rental unit. Fazal Ahmed was not present at the hearing to testify to what his observations were. HA submits that when he attended the rental unit in August, 2021, he observed that the carpet and floors as well as the paint looked damaged however HA himself could not provide any evidence as to the condition of the rental unit as at April 5, 2022. HA submits that Fazal Ahmed advised him in a "whatsapp" communication that it would cost $12,000.00 to fix the rental unit but did not provide a copy of said communication at the hearing. As well, no photographs or any other documentary evidence were tendered at the hearing to substantiate the Landlord's damage claim.

27. Subsection 62(1) of the *Act* provides:

> 62(1) a landlord may give a tenant notice of termination of the tenancy if the tenant, another occupant of the rental unit or a person whom the tenant permits in the residential complex willfully or negligently causes undue damage to the rental unit or the residential complex.

28. To succeed on this claim, the Landlord must establish the following:

> (a) physical damage to the rental unit or the residential complex;
> (b) physical damage that is "undue", meaning not normal wear and tear; and
> (c) damage that is willfully or negligently caused by the tenant, another occupant of the rental unit or a person whom the tenant permitted in the residential complex.

29. On an application before the Board, the person who alleges any particular incident or event occurred has the burden of leading sufficient evidence to establish that it is more likely than not that their version of events is true. In this case, that burden falls on the Landlord. For the reasons that follow, I find that the Landlord has not led sufficient evidence to establish that the Tenant willfully or negligently damaged the rental unit.

30. Other than HA testifying that other people had told him that the rental unit was damaged and that it was believed it would cost $12,000.00 to repair, no documentary evidence including any photographs, videos, invoices, receipts or quotes or *viva voce* evidence was tendered at the hearing to substantiate the Landlords' claims. As HA did not physically attend the rental unit during the alleged period of time and therefore did not observe any of the alleged damage to the rental unit, I give no weight to his evidence.

31. The email communication dated May 24, 2022 from the home inspector that the Board was referred to does not refer to any damage which the Landlord's L2 application and the N5 notice indicates took place on April 5, 2022. Instead, the email communication refers to "lots of cigarette butts on concrete porch" and that "the front step area was a mess". In

fact, the email pertained to observations made which were after the alleged contravention stipulated in the N5 notice.

32. The Landlord also states in the N5 notice that the Tenant did not permit an inspection of two rooms in the rental unit however, this allegation does not meet the definition of "damage" pursuant to section 62(1) of the *Act*. As can be seen by the wording of this provision, the kind of "damages" the Board has jurisdiction over is the cost of repairing physical damage to the rental unit or the residential complex. In my view, none of the Landlord's allegations regarding willful or negligent damage to the rental unit, as particularized in the N5 notice, have been substantiated.

33. Given the evidence and submissions before the Board, I am not satisfied, on a balance of probabilities, that the Landlord has established that the Tenant wilfully or negligently caused undue damage to the rental unit.

Section 89 Damage Claim:

34. Included in the Landlords' L2 application is for compensation in the amount of $12,000.00 for damage to the rental unit.

35. Subsection 89(1) of the *Act* says:

> A landlord may apply to the Board for an order requiring a tenant to pay reasonable costs that the landlord has incurred or will incur for the repair of or, where repairing is not reasonable, the replacement of damaged property, if the tenant, another occupant of the rental unit or a person whom the tenant permits in the residential complex willfully or negligently causes undue damage to the rental unit or the residential complex and the tenant is in possession of the rental unit.

36. In order for an application for compensation for damages made pursuant to subsection 89(1) of the *Act* to succeed, a landlord must establish the following:

> (a) there was property damage to the rental unit or residential complex;
>
> (b) the damage is "undue" meaning that it is not normal wear and tear and it is not insignificant; and
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> (c) the damage was a result of wilful or negligent conduct by the Tenants, occupants or guests.

37. In this context, I take the word "property" to refer to physical objects like the walls, ceilings, floors, appliances and fixtures in a residential complex.

38. If all of these factors are met, then the Board can award the Landlord the reasonable costs of repair or the replacement cost if it is not reasonable for the damage to be repaired.

39. Given the evidence and submissions before the Board, and as indicated previously, I am not satisfied, on a balance of probabilities, that the Landlord has established that the Tenant willfully or negligently caused undue damage to the rental unit. The Landlord's L2 application is therefore dismissed.
40. This order contains all of the reasons for this decision within it and no further reasons will be issued.

It is ordered that:

L1 Application:

1. The Tenant shall pay to the Landlord $35,186.00. This amount includes rent arrears owing up to July 31, 2023 and also up to the Board's jurisdiction as well as the cost of the application.
2. If the Tenant does not pay the Landlord the full amount owing on or before August 19, 2023, the Tenant will start to owe interest. This will be simple interest calculated from August 20, 2023 at 6.00% annually on the balance outstanding.

L2 Application:

3. The Landlord's L2 application is dismissed.

August 8, 2023
Date Issued

Heather Chapple
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.