



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

Citation: DRAKE PROPERTY MANAGEMENT v Martinez, 2023 ONLTB 51188

Date: 2023-07-24

File Number: LTB-L-037692-22

In the matter of: 109, 1570 LAWRENCE AVE W
NORTH YORK ON M6L1C2

Between: DRAKE PROPERTY MANAGEMENT Landlord

And

Freddy Martinez Tenant
Esther Martinez

2023 ONLTB 51188 (CanLI)

DRAKE PROPERTY MANAGEMENT (the 'Landlord') applied for an order to terminate the tenancy and evict Freddy Martinez and Esther Martinez (the 'Tenant') because:

- the Landlord requires vacant possession of the rental unit in order to do major repairs or renovations to the unit.

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

Procedural History:

This application was initially heard by videoconference on May 1, 2023 and was adjourned at the Tenant Representative's request to review the Landlord's recent disclosure documents.

The matter was then heard by video conference on May 24, 2023, prior to being adjourned again due to lack of time. At that hearing date the Landlord presented the entirety of their case.

This application was concluded by video conference on June 16, 2023 at 09:00 am at which time the Tenants' Representative presented the entirety of their case.

The Landlord Representative Patty Duwyn, the Tenants' Representative Kyle Warwick and the Tenant Esther Martinez attended the hearing.

Determinations:

1. As explained below, the Landlord has not proven on a balance of probabilities the grounds for termination of the tenancy and the claim for compensation in the application. Therefore, the application is dismissed.
2. The Tenant was in possession of the rental unit on the date the application was filed.

3. On April 25, 2022, the Landlord gave the Tenant an N13 notice of termination with the termination date of August 31, 2022 deemed served on the same date. The Landlord claims vacant possession of the rental unit is required for extensive repairs and renovation to the plumbing.
4. On August 15, 2022 the Landlord compensated the Tenant an amount equal to 3 months rent by crediting the Tenant's account. A copy of the Tenant's ledger was entered in evidence to support this.

Landlord's Witnesses testimony and evidence

5. Vince Disante testified that in his capacity as a construction engineer, he was hired by the Landlord to develop the engineering plans for the proposed work, which includes installation of washing machines in the rental unit and connecting its waste line the main sanitary drain. Referring to the plans, entered in evidence, he testified that there were two proposed locations for the washing machines, the kitchen and or the bathroom. On the engineering plans there were two proposed routes for the waste lines, depending on which location they were required to place the machine due to the state of the underground plumbing. In both cases no additional permits, other than those already obtained and entered in evidence, would be required as no load bearing walls would be affected and there would be no significant change to the existing floor plans.
6. On cross examination it was his testimony that the water to the building may or may not have to be shut off and that vacant possession would be necessary to ensure the completion of the work within 8-10 weeks and the safety of the residents. If the Landlord does not receive vacant possession, it was his testimony that the project could take 4-6 months. He could not speak to whether the existing laundry room would be available during the project.
7. Martin Walter testified that he has been the Landlord's project manager for 12 years, responsible for overseeing interior renovations and retrofits for several properties. The installation of washing machines is just one portion of several projects planned or completed for the rental complex. The purpose of the project is to repair and upgrade the existing plumbing on the entire ground floor as they had received several complaints about back-ups within units, a broken water main line from the street and that there had been flooding in the elevator shaft. These repairs and upgrades include the flushing of existing lines and installation of a new line for the proposed washing and drying machines. They had already completed the upgrades on two of the units where the tenants had vacated. They renovated and upgraded these two units over a period of 5 months. He also testified that there was two weeks of preparation prior to the commencement of the plumbing to include removal of the kitchen.
8. He testified that although they had no issues completing the work in the two previous units, he was unsure of the extent of work required for the remaining units that are subject to this application. It was his position that vacant possession would be required because if they find any issues with the existing plumbing, which dates to the 1950s-60s, they would be obligated to replace it, thereby prolonging the project.
9. Martin Walter also testified that a complete renovation would be quicker, taking approximately 3-4 months, but would not be completed for those units where tenants had

chosen to exercise their right of first refusal to move back into their rental unit once the repairs are completed. For those Tenants who choose to exercise their right of refusal to move back into their rental unit once the repairs are completed, it was his testimony the project would take 6-8 months given they would have to remove the kitchen and re-install it once repairs to the plumbing was complete. However, only those Tenants who agreed to a new lease, at the 2023 rental rate, would receive a washing machine.

10. In response to the Tenant Representatives submissions, the Landlord Witness Martin Walter maintained his opinion that they wouldn't know the extent of the plumbing issues until they opened the floor. He also disagreed with the submission that the rental unit could be made safe when work wasn't being completed given the extent of work proposed, the trenching, particulates in the air and possible smell from exposed waste lines. Picture of the trenching were entered in evidence to support this. He testified that he couldn't speak to when he first received complaints about the plumbing but verified that a preliminary scan was completed in August 2022. He was steadfast in his belief that the work proposed was necessary to revitalize the rental complex and neighborhood. He couldn't say for sure if the project would move forward without vacant possession but reiterated that it would take 6-8 months to complete a full renovation with vacant possession and 3-4 months if the Tenant intended on returning.
11. Corey Beckman testified that his company, CMB plumbing, had been hired by the Landlord to carry out the plumbing maintenance, dishwasher, washing machine and dryer install for all the ground floor rental units at the rental complex. He testified the Landlord requires vacant possession and wouldn't know the extent of work required until they opened the flooring and drywall. It was his opinion that given the age of the building that there was the possibility of asbestos. He further testified as the construction manager he would be responsible for the site and believes it would not be safe for tenants to be present while the construction was ongoing due to particulates in the air, possible asbestos, and fumes from exposed waste lines. It was his estimation that the plumbing alone would take 17 days should they find any issues that would require fixing. On cross examination, he testified that there would be particulates in the air for at least two weeks following the plumbing work, but acknowledged that to date they had not encountered any asbestos within the rental complex.

Tenant's Witnesses testimony and evidence

12. Pat Iacoucci testified that in his capacity as a plumbing inspector for the City of Toronto (COT) he is responsible for inspecting the proposed project at the rental complex. In that capacity he confirmed that all necessary permits had been obtained and thus far no issues were discovered in the units he had inspected. He also testified that the plumbing work proposed, specifically the cleaning of existing line, installation and connection of a washing machine should not take more than 2-3 days, not including remediation. He also testified that any potential issues could be identified prior to exposing the piping by conducting scans. He was also of the opinion that vacant possession was not a requirement for the plumbing work proposed and that the. He also testified that there was no obligation to address plumbing issues should they be found and that if a proper maintenance program was in place there shouldn't be any.

13. Sandeep Sarin testified that he has been living in the rental unit for over 24 years. He also testified to witnessing the work completed on the other, vacant units. It was his testimony that in both cases the Landlord demolished the unit over a couple days, completed and then renovated the units which were then re-listed at a higher rent. It was his opinion that the plumbing work was completed within two days and there was only a half day disruption to the water supply to the rental complex.
14. On cross examination he acknowledged that based on what he saw, if he were to remain in his rental unit while the work was being completed, he would not have full use of the rental unit. He also testified to being aware of some plumbing issues within the rental complex but not to the extent that would require them to vacate. He testified that he would be willing to temporarily stay with family or friends for the times where he wouldn't be able to remain.

Tenant testimony and evidence

15. The Tenant Esther Martinez testified that they had lived with their family in the rental complex for over 30 years, emphasizing that his three daughters never knew of any other home and still lived with him as they pursued their post-secondary education in the area. He also testified that they were prepared to stay with family and friends temporarily if required but had no desire to move.

Final submissions

16. It was the Tenant Representative's submission that the Landlord had failed to prove that vacant possession was a requirement, citing the testimony of Paul Iacoucci that contradicted that of the Landlord's witnesses regarding timelines. He also asked that I consider the Landlord's pattern of behaviour, alleging the Landlord only sought vacant possession to renovate the rental unit so that they may rent the unit out at a higher rate. He submitted that this calls into question the necessity for the proposed renovations and real motivations behind the Landlord's application for vacant possession.
17. It was the Landlord Representative's submission that the permits required to facilitate the work proposed as per the N13 Notice had been obtained. Furthermore, the Tenant had been compensated according to the Act, and based on the evidence and testimony presented vacant possession was required due to the scope of work, length of time required and potential health risks to the Tenant. She further requested that I consider the rights of the Landlord as well as those of the Tenant as prescribed by the section 1 of the Act. She also requested that I consider the real substance of the Landlord's application as prescribed by section 202 of the Act and not the unsubstantiated claims as presented by the Tenant Representative.

Analysis

14. The N13 notice was served under section 50(1)(c) of the Act which states:

50 (1) A landlord may give notice of termination of a tenancy if the landlord requires possession of the rental unit in order to,

(c) do repairs or renovations to it that are so extensive that they require a building permit and vacant possession of the rental unit.

15. Having considered the above testimony and evidence, I find that the Landlord has not established on a balance of probabilities that the Landlord requires the rental unit to be vacant in order to complete the proposed plumbing work.
16. I find that the most persuasive evidence on the issue of whether vacant possession is required for the proposed work was provided by Mr. Iacoucci, the COT plumbing inspector. As a neutral third party with extensive experience in plumbing projects, his evidence is entitled to greater weight than that offered by contractors or engineers who are employed, or hope to be employed, by the Landlord.
17. With respect to the issue of the safety, I accept Mr. Iacoucci's testimony that the rental unit could be made safe during the work, allowing the Tenant to remain, when work wasn't being actively performed. All the Landlord's witnesses stated that one of the reasons for vacant possession was the potential safety issues caused by unknown factors. Whether it be the necessity to tear up all the flooring or the possibility of asbestos they were resolute that these were cause for concern and necessitated vacant possession given their potential impact to the project timeline and the Tenant's health. However, I cannot overlook the fact that all were consistent in stating that none of these issues had arisen so far, having already performed a complete renovation of two units. Accordingly, I am not satisfied that potential unknown safety concerns as presented by the Landlord are a sufficient basis to conclude that vacant possession is required for the Landlord to complete the proposed work.
18. Similar is my assessment of the potential safety issue presented by the trenching involved in the proposed work. The Landlord's witnesses all stated that making the area safe is not an option whereas Mr. Iacoucci stated otherwise. The pictures entered in evidence by the Landlord, in my view, are not an accurate representation given they were taken in units where vacant possession was already obtained, and a full renovation was underway which is beyond the scope of work specified in the N13 Notice. Accordingly, I am left to rely on the testimony of the witnesses and in this regard, I prefer the evidence of Mr. Iacoucci for the reasons set out above.
19. The Landlord's assertion that vacant possession is required for because of how long the proposed work will take is also undermined by inconsistencies in the evidence on this point. Vince Disante, the Landlord's engineer, testified the entire project would take 3 months if the unit was vacated and 4-6 months if the Tenant was in possession. Contrary to this the N13 Notice and the Landlord's Project Manager Martin Walter testified that the project could take 8-12 months with the tenants in possession. The Landlord's Plumbing Contractor Corey Beckman testified the plumbing work could take up to 17 days should they have to fix any problems they discover. In contrast Mr. Iacoucci testified problems could be identified prior to breaking the floor through scanning and that the plumbing should only take 2-3 days. I acknowledge that Mr. Iacoucci did not address in his testimony the time required to remove and reinstall the kitchens. However, even if several months were added to the project for that portion of the work, it would still fall well short of the 8-12 months claimed in N13 Notice. Thus, I do not accept the Landlord's assertion that it would take the 8-12 months to complete the work if the Tenants were still in occupation of rental unit.

20. While I accept that it would likely be easier and possibly somewhat faster for the Landlord to complete the work of if the Tenant was not in possession, under section 50(1)(c) of the Act the Landlord must establish that vacant possession is required to complete the proposed work.
21. Based on the determinations above I am not satisfied the Landlord has proven on the balance of probabilities that vacant possession is required to complete the work in a safe and timely manner if the Landlord adopts reasonable safety measures. Therefore, I must dismiss the Landlord's application.

It is ordered that:

1. The Landlord's application is dismissed.
2. The Tenant shall pay back to the Landlord the 3 months compensation credited to them.
3. If the Tenant does not pay the Landlord the full amount owing on or before August 31, 2023, the Tenant will start to owe interest. This will be simple interest calculated from September 1, 2023 at 6.00% annually on the balance outstanding.

July 24, 2023
Date Issued

Kelly Delaney
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.

