Order under Section 21.2 of the Statutory Powers Procedure Act and Section 57 of the Residential Tenancies Act, 2006

Citation: ESPOSITO v ADDIS, 2023 ONLTB 49767
Date: 2023-07-14
File Number: LTB-T-069440-22
(TST-08870-19)

In the matter of: 703, 112 GEORGE STREET
TORONTO ON M5A2M5

Between: JOHN ESPOSITO — Tenants
SONYA ESPOSITO

and

GEOFFREY ADDIS — Landlord

Your file under file number TST-08870-19 has been moved to the Landlord and Tenant Board's new case management system, the Tribunals Ontario Portal. The new file number is set out above.

JOHN ESPOSITO and SONYA ESPOSITO (the 'Tenants') applied for an order determining that GEOFFREY ADDIS (the 'Landlord') gave a notice of termination in bad faith. The matter was resolved by way of order TST-088700-19 issued on July 6, 2022 (the 'Original Order'), granting the Tenants' application.

Review Request

On August 4, 2022 the Landlord requested that the Original Order be reviewed and that the order be stayed until the Landlord's request to review the order is resolved.

The Landlord submitted, in the request for review, that the Original Order failed to mention why the Member could not find the Landlord's testimony about his intentions to be credible. The Landlord submitted that he had been left with no choice but to vacate the property and re-rent the Tenants' unit (the 'Unit') after taking possession. The Landlord submitted that the Member

acknowledged, in the Original Order, that there had been a change in circumstances but failed to consider, in the reasons, the impact on the Landlord of that change.

The Landlord also submitted that the Member who issued the Original Order failed to consider, or to address in reasons, evidence about the Landlord's intentions at the time the N12 notice of termination was served. The Landlord submitted that this failure constituted a serious error.

The Landlord's request for review was first heard by video conference on September 19, 2022. The Tenant John Esposito ('JE'), on behalf of both Tenants, the Landlord and the Landlord's representative, C. Aylwin, attended the hearing.

As set out in Interim Order dated November 16, 2022, I determined that there was a serious error in the in the Original Order because it failed to adequately address evidence about the Landlord's intentions at the time the N12 notice of termination was served and/or how any change in circumstances may have affected the Landlord's position about his alleged intentions. I noted, in the Interim Order, that if I were to find that bad faith has been made out after a new hearing was held, the remedies set out in the Original Order would stand.

There was insufficient time on September19, 2022 to complete the rehearing and the proceeding was adjourned to December 9, 2022. That hearing was rescheduled, on consent, at the request of the Landlord as a witness for the Landlord was undergoing medical treatment and was unable to testify that day.

The hearing was completed by video conference on May 18, 2023.

The Landlord, the Landlord's representative, C. Alwin, and the Tenant JE, on behalf of both Tenants, attended the hearing. T. Sword ('TS') attended a portion of the hearing as a witness for the Landlord.

Determinations:

1. Subsection 57(1)(a) of the *Residential Tenancies Act,* 2006 (the 'Act') provides that in order to obtain a remedy the Tenants must establish that:

    - The Landlord gave an N12 notice of termination under section 48 of the Act in bad faith;

    - The Tenants vacated the rental unit as a result of the notice or as a result of an order made by the Board based on the notice; and

    - No person referred to in clause 48(1)(a), (b), (c) or (d) occupied the rental unit within a reasonable time after the Tenants vacated the rental unit.

2. Subsection 48(1) of the Act provides that a landlord may, by notice, terminate a tenancy if the landlord in good faith requires possession of the rental unit for the purpose of residential occupation for a period of at least one year by, *inter alia*, the landlord.

3. The question before me is whether the evidence before the Board establishes, on a balance of probabilities, that the Landlord gave the notice of termination under section 48 in bad faith – that is, whether the first branch of the test set out in paragraph 1 above was properly made out.

4. Subsections 57(5(a) and (b) of the Act provide that it is presumed that the landlord gave the notice of termination in bad faith if the landlord re-rents the Unit within one year of the tenant vacating, unless the contrary is proven on a balance of probabilities.

5. It was uncontested both that the Landlord advertised the Unit for rent and entered into a tenancy agreement in respect of the Unit with someone other than the Tenants within roughly six months from the date the Tenants vacated the Unit. Therefore, the presumption of bad faith applies and the onus shifts from the Tenants to the Landlord to establish, on a balance of probabilities, that the Landlord gave the N12 notice of termination in good faith.

6. I find, as follows, that the Landlord has not refuted the bad faith presumption and that the first branch of the subsection 57(1)(a) test has been made out. Therefore, the remedies set out in the Original Order will remain.

7. Relevant facts relating to the bad faith allegation were largely undisputed and were as follows:

    - As of January 2019 the Landlord was living with a platonic friend, TS, in a 1300 square foot unit (the 'Landlord's Prior Unit') owned by the Landlord and members of his family. TS did not pay any rent or contribute to housing charges at the Landlord's Prior Unit. The Landlord was allowing her to stay with him as a favour, as TS was going through some financial difficulties involving, in part, a large HST debt;

    - The Landlord faced financial challenges which made his continued occupation of the Landlord's Prior Unit untenable. He owed roughly $70,000.00 in consumer debt (Refer Exhibit 5, being credit statements at pages 26 though 39 of the Landlord's document brief). He could not afford the carrying charges of the Landlord's Prior Unit, together with those for other properties which he owned. In order to save money he determined that it would be best for him to move into cheaper accommodation. He determined that the Unit was the most feasible for him for that purpose;

- The Landlord met with the Tenants in early January 2019 and explained his intent to move into the Unit and the rationale for that move. (Refer Exhibit 1, being January 8, 2019 email at page 12 of Tenants materials). He served the Tenants with an N12 form in January 2019, setting a termination date of March 31, 2019. He advised the Tenants that if they were to find new accommodation ahead of that date they could discuss partial rent payment;

- The Tenants found new accommodation and vacated the unit on February 14, 2019, ahead of the March 31, 2019 N12 termination date;

- The Landlord and TS moved into the unit in February 2019, shortly after the Tenants vacated. They quickly found that the roughly 600 square foot area was too small to comfortably accommodate them both. TS herself had a condo which she had been renting out. Shortly after moving into the Tenants' unit, and prior to the March 31, 2019 termination date in the N12 notice, TS decided that she would be better off financially to sell her own condo and retire her HST debt by way of a lump sum payment. She sold the condo in mid-March 2019. She then bought a condo

  which had come up for sale in a building in which she had been interested. She purchased that condo on April 30, 2019 for a closing date in August 2109;

- When TS purchased the new condo in March 2019 she suggested that the Landlord come to live with her in that condo. It was a two bedroom unit and was substantially larger than the Unit. This scenario appealed to the Landlord as TS would not be charging him for accommodation and the arrangement would allow him to further improve his financial position. He and TS moved out of the Unit and into the condo in or around August 2019, when the purchase of the condo closed;

- The Landlord listed the Unit for rent in August 2019. The Unit was rented out for a higher amount than that paid by the Tenants. New tenants took occupancy at the beginning of September 2019; and

- The Landlord lived in TS's condo for a short time – roughly 10 months. Once the Landlord's financial problems were addressed, mainly through newly acquired employment, he moved back into the Landlord's Prior Unit – the one he had vacated to move into the Tenants' Unit.

8. The Landlord takes the position that at the time the N12 notice was served he had a good faith intention to take over the Tenants' unit for his own residential use. The Landlord submits that any finding of bad faith must be based solely on consideration of what was in the Landlord's mind at the time the N12 notice was served. His decision to vacate and rerent the unit was based on a change in circumstances subsequent to the service of the N12 notice and was not indicative of any initial bad faith intent.

9. My determination about the Landlord's intentions must be made on a contextual basis, in consideration of the circumstances, events and decisions which followed the service of the N12 notice. While the Act describes the test in section 57 as being bad faith in the issuance of the notice, I must also consider the purposes of the Act, which include to balance the rights and responsibilities of residential landlords and tenants. More specifically, in interpreting and applying sections 48 and 57 of the Act, I must balance the rights of landlords to in good faith take occupancy of a unit for their own residential occupation for a period of at least one year with the rights of tenants to security of tenure. This latter includes tenants' right to pursue a remedy at the Board if the landlord obtained the unit in bad faith and does not live in the unit for at least one year.

10. Limiting the question of good faith to an exploration of the mind of the Landlord at the instant of serving the N12 notice, and to ignore all the surrounding circumstances, would lead to results inconsistent with the objects of the Act. To require the Tenants to establish what was in the mind of the Landlord at the instant of the N12 notice being served, without regard to the surrounding circumstances and to the behaviour of the Landlord subsequent to the service of the N12 notice, would upset the balance of interests which the Act aims to achieve (Refer *CET-67272-17 (Re)* and *TST-914-18 (Re)*).

11. A number of Board decisions have found that an unforeseen change in circumstance that prevents the person listed in the N12 notice of termination from taking possession may result in a finding that it was not served in bad faith. (Refer *TST-08803-19 (Re)*, *CET25233-12 (Re)* and *TST-63837-15 (Re)).* The key question in the circumstances of the application before me, however, is whether the change in circumstance prevented the Landlord from maintaining possession for one year as required under section 48, further to the requisite intent behind the N12 notice. That is to say, did new, unanticipated, circumstances compel the Landlord to leave the unit – and so not maintain possession for a year?

12. I find, as follows, that the events and decisions which surround the service of the N12 notice and the Landlord's subsequent re-rental of the unit bely the Landlord's testimony about his good faith intention to live in the unit for one year:

    - The good faith intention includes an element of commitment to at least one year of residency unless new, unanticipated circumstances render that commitment untenable;

    - The Landlord knew, or ought to have known, that the 600 square foot rental unit would be too small for both the Landlord and TS to live comfortably for one year. When asked, during the hearing, whether he should have contemplated that the unit would have been uncomfortably small for TS and himself, the Landlord simply testified that he hadn't realized how tight it would be. I find this testimony to be unconvincing. The Landlord was fully aware of the size of the unit that he owned

and should reasonably have contemplated that accommodation by two friends would prove challenging;

- The Landlord's basis for the move into the unit was to save paying the substantial carrying costs at the Landlord's Prior Unit and to carry lower costs at the Tenant's unit. There was no dispute that the Landlord in fact enjoyed that cost reduction on moving into the unit. The circumstances in that regard remained unchanged;

- There was no evidence of any necessity for the Landlord to leave the Unit when TS chose to move into the condo she had purchased. He and TS were not in a partnership relationship. He had not collected rent from TS at the Landlord's Prior Unit and there was no evidence that he was compelled to rely on income from TS at the Unit. He already enjoyed a reduction in expenses with the move from the Landlord's Prior Unit to the Unit. The Landlord acknowledged that he did not attempt to get a new roommate when TS moved to her new condo as "it wouldn't make sense". As I understood the Landlord's testimony, the reason that it would not make sense was that it was more advantageous for him to move to the new condo with TS, live there rent free, and re-rent the Unit than to stay in the Unit with or without financial contribution from a new roommate;

- TS's sale of her condo in March 2019 and her subsequent purchase of the new condo constituted a change in circumstance which presented the Landlord with an opportunity to save further on expenses. It did not, however, constitute a change in circumstances which prevented the Landlord from continuing to live in the Unit for at least one year. His decision to avail himself of the new condo opportunity rather than stay in the Unit militates against a finding of an original commitment on his part at the time the N12 notice was served; and

- Within roughly a year and a half of leaving the Landlord's Prior Unit, the Landlord returned to live in that unit. According to the Landlord's evidence, he obtained new employment subsequent to the onset of COVID, was able to turn his finances around and, with his stronger financial position, was able to return to the first unit;

13. I find that the Landlord's change in circumstances did not constitute the type of change which compelled him to move from and re-rent the Unit. I find that his actions were inconsistent with a finding that he was committed, in good faith, to living in the Unit for at least one year. I find that his testimony in that regard is refuted by his own actions and find that he has failed to establish the requisite good faith to rebut the bad faith presumption st out in subsection 57(1)(a) of the Act.

14. As an aside, the Landlord lived in the Unit for a time after the Tenants vacated before rerenting it. The question of whether the third branch of the subsection 57(1)(a) test was satisfied was not raised by the parties. Nonetheless I note, in obiter, that an N12 notice given under section 48 of the Act stipulates that the landlord must be intending to live in the

rental unit for at least one year. That requirement cannot be ignored when interpreting and applying subsection 57(1) of the Act. A landlord cannot defeat an application under subsection 57(1) of the Act by simply occupying the subject unit for a nominal amount of time regardless of that landlord's bad faith.

It is ordered that:

1. The Tenants' application is granted and the remedies set out in Order TST-08870-19 dated July 6 2022 shall stand, subject to modified dates, as set out in paragraphs 2 through 7 below.

2. The Landlord shall pay to the Tenants $50.00 for the cost of filing the application.

3. The Landlord shall pay to the tenants $7,080.00. This amount represents all of the increased rent that the Tenants have incurred from February 2 2019 to January 31, 2020.

4. The Landlord shall pay to the Tenants $1,250.00 for the reasonable out-of-pocket expenses that the Tenants have incurred for moving expenses, the cost of renting a moving vehicle, gas, paid worker to help moving and loss of wages.

5. The total amount the Landlord owes the Tenants is $8,350.00.

6. The Landlord shall pay the Tenants the full amount owing by August 22, 2023.

7. If the Landlord does not pay the Tenants the full amount owing by August 22, 2023, the Landlords will owe interest. This will be simple interest calculated from July 18, 2022 at 6.00% annually on the outstanding balance.

August 11, 2023
Date Issued

_____
Lynn Mitchell
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.