



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

Citation: Saira Nazim v Mariantonia Da Fonte, 2023 ONLTB 37760

Date: 2023-05-31

File Number: LTB-L-065396-22

In the matter of: 3221 CABANO CRES
MISSISSAUGA ON L5M0B9

Between: Saira Nazim Landlords
Tahir Khurshid

And

Mariantonia Da Fonte Tenants
Nelson Da Fonte

Saira Nazim and Tahir Khurshid (the 'Landlords') applied for an order to terminate the tenancy and evict Mariantonia Da Fonte and Nelson Da Fonte (the 'Tenants') because the Landlords in good faith require possession of the rental unit for the purpose of residential occupation for at least one year.

The Landlords also claimed compensation for each day the Tenants remained in the unit after the termination date.

This application was heard by videoconference on April 20, 2023.

The Landlords, the Landlords' legal representative, Kristen Netta ('KN'), the Landlords' witness, Arab Mohammed Nasir ('AMN'), and the Tenants attended the hearing.

Determinations:

1. As explained below, the Landlords have proven on a balance of probabilities the grounds for termination of the tenancy and the claim for compensation in the application.
2. The Tenants were in possession of the rental unit on the date the application was filed.

The N12 Notice

3. On August 31, 2022, the Landlords gave the Tenants an N12 notice of termination with the termination date of October 31, 2022. The Landlords claim that they require vacant possession of the rental unit for the purpose of residential occupation by the Landlords and their children.
4. The N12 notice of termination was served under section 48 of the *Residential Tenancies Act 2006* (the 'Act'). Section 48 of the Act permits a landlord to give a tenant a notice of termination if the landlord or the landlord's spouse or child in good faith requires

possession of the rental unit for the purpose of residential occupation for a period of at least one year.

5. The Landlord, Tahir Khurshid ('TK'), testified that he and his wife, Saira Nazim ('SN') own the property jointly, and that they purchased the property in August 2007. The rental unit is a 4-bedroom single family home.
6. TK testified that prior to serving the N12 notice, the Landlords gave the Tenants an informal 3-month notice at the end of May 2022 that they needed possession of the rental unit for their own use to give them an opportunity to secure other living accommodation. He stated that the Landlords and their family need possession of the rental unit for their own residential occupancy because their eldest son was married in Pakistan in October 2021, and his wife has now joined the family in Canada. He stated that it took one year for his son's wife to lawfully come to Canada, and she is here now.
7. Now, the Landlords' son's wife is living with the Landlords and their two adult sons. They currently live in a 2-bedroom apartment. There are two married couples living in the apartment, as well as the Landlords' other son who is 27 years old and needs his own living space as well. Currently the Landlords occupy one bedroom, their eldest son and daughter-in-law occupy the second bedroom, and their other son is sleeping in the living room.
8. TK stated that the Landlords, their two sons and their eldest son's wife all intend to live in the rental unit for at least one year. The intention of the Landlords and their sons and daughter-in-law is to move into the rental unit as soon as they have possession of it.
9. TK stated that the rental unit is also closer to SN's place of work, and it is also closer to his daughter-in-law's relatives. One of the Landlords' sons attends Humber College and the other works in Mississauga, and the rental unit is convenient to both of those locations. He also stated the he travels a lot for work and the location of the rental unit is convenient to get to the airport.
10. SN testified that the May 31, 2022 "notice the Landlords gave to the Tenants was a letter saying the tenancy would terminate on August 31, 2022. The Landlords then sought legal advice, after which they served the N12 notice. She also stated that the rental unit suits her family's needs, and their current living accommodation does not. She stated their intention is to occupy the rental unit as soon as they have possession of it if the tenancy is terminated.
11. To satisfy the good faith requirement under section 48 of the Act, a Landlords needs only to "... show a genuine intention to terminate the tenancy for the purpose of occupation..." by the person or people identified in the N12 notice.¹ I accept the Landlords' evidence on this point, and find that their genuine intent is to terminate the tenancy so that they, as well as their two sons and daughter-in-law, can move into the rental unit and live there for at least one year.
12. I am satisfied that the Landlords, in good faith require possession of the rental unit for the purpose of their own residential occupation, as well as that of their two sons and daughter-in-law for a period of at least one year.

¹ *Salter v. Beljinac*, 2001 CanLII 40231 (ON SCDC)

The Termination Date

13. Subsection 48(2) provides that the termination date specified in a notice under section 48 must be at least 60 days after the notice is given, and it must be the last day of a period of the tenancy, or where the tenancy is for a fixed term, the last day of the term.
14. The termination date in the N12 notice was October 31, 2022. This was at least 60 days after the notice was served, but there was a dispute relative to whether this was the last day of a period or the term of the tenancy. The Landlords' position was that this was a month-to-month tenancy, and this was the last day of a period. The Tenants' position was that there was term remaining on the tenancy, and the N12 notice was defective because the termination date was before the last day of the term.
15. TK testified that the Landlords entered a written lease with the Tenants for the rental unit dated September 6, 2007. The lease commenced in September 2007 and was for a fixed term of two years. The lease states that the rent is due on the first day of each month.
16. TK stated that at the expiry of the initial term, the term was extended for an additional two years at an increased rent. TK stated that after this time there were no other renewals or extensions of the term of the tenancy. SN also stated that the tenancy was month to month, and there was no fixed term remaining on the tenancy when the N12 notice was served.
17. AMN testified that he sometimes coordinated communications between the Landlords and Tenants. AMN stated that the Landlords had never communicated to him that they wanted to enter into a three-year fixed term renewal of the tenancy agreement, and that to his knowledge, the lease was month-to-month.
18. On cross examination, the Tenants asked AMN if he remembered a conversation he had with the Tenants, Nelson Da Fonte ('ND') on May 29, 2022. AMN did not remember the conversation. The Tenants submitted a recording of this conversation, and a portion of the conversation where the Tenants contend AMN acknowledged the existence of the three-year term was played. When questioned about what was said in this audio clip, AMN stated that at the time there was three years left on the Landlords' mortgage for the rental unit, and that is what he was referring to in the recording.
19. AMN stated that he never agreed with the Tenants to a three-year extension of the tenancy agreement beginning in September 2021.
20. The Tenants' evidence was that they were in the midst of a three-year term that would not expire until August 2024.
21. The Tenants stated that they made an oral agreement with AMN that the tenancy agreement would be renewed for a three-year term at an increased rent beginning September 2021. AMN testified that this was not true.
22. ND testified that when listening to the recording of the May 29, 2022 conversation between AMN and ND in its entirety "there is something there", indicating that the tenancy is not month-to-month, and there is a three-year term that would not expire until August 2024. He stated that there were always renewals of the term correlating with rent increases over the course of the tenancy. He stated that the Landlords reneged on this three-year term about

7 or 8 months into it, saying the Tenants had no proof because there was nothing on paper.

23. On cross-examination, ND stated that he never spoke to the Landlords directly about renewing the tenancy agreement for a three-year term, because AMN was always the Landlords' representative with respect to their tenancy.
24. The Tenants Mariantonia Da Fonte ('MD') testified that the referrals in the May 29, 2022 audio recording to the "three years" were referrals to the existence of the three year term, not to the Landlords' mortgage. She says that AMN was going to go back to the Landlords and mention there was a three-year term. MD reiterated that this was an oral agreement, which is why there is no written evidence.
25. MD stated that the tenancy has never been month-to-month, and the tenancy agreement was always renewed for one or two-year terms. She stated that these agreements were always oral, and the last one in place was for a three-year term from September 2021 to August 2024.
26. In this case, the Landlords both testified that they did not enter into an agreement with the Tenants to renew the tenancy agreement for three years beginning in September 2021, nor did they ask AMN to do so. AMN stated that he did not agree to this renewal either. Both Tenants on the other hand, were adamant that the tenancy agreement was renewed for a three-year term beginning September 2021, and this agreement was made with the Landlords through AMN.
27. While I do accept that the Tenants' sincere belief was that the tenancy was renewed for a three-year term beginning in September 2021, I cannot find on a balance of probabilities that this was the case. The purported contract was oral, and as explained below, there was inadequate evidence before me to determine that there was a mutual intention between the Landlords and the Tenants to create a legally binding contract to renew the lease for this three-year term.
28. I listened to the entire recording of the May 29, 2022 conversation between ND and AMN. There is not any part of the conversation that makes it clear that the three-year extension was mutually agreed to by the Landlords and Tenants. While there is reference to "the three years", there is no clear acknowledgement from AMN that the parties agreed to a three-year extension to the tenancy agreement beginning in September 2021. In particular, it is not clear that AMN was not acknowledging the term left on the Landlords' mortgage, as he stated at the hearing, as opposed to a three year extension of the term of the tenancy agreement.
29. Determining the existence and agreed terms of an oral contract is difficult. Tenancy agreements and renewals of tenancy agreements under the Act can be oral. Tenancy agreements are contracts, and for a contract to exist, I must be able to determine that the parties (i) had a mutual intention to create a legally binding contract, and (ii) reached agreement on all the essential terms of the contract.² To prove a fact on a balance of probabilities, a party must present "clear, convincing, and cogent" evidence of that fact.³ The evidence before me from the Tenants that there was a three year term extension to

² *Olivieri v. Sherman*, 2007 ONCA 491 (CanLII), Para 41

³ *FH v. McDougall*, 2008 SCC 53 (CanLII), para 46

the tenancy agreement was not adequate to meet this threshold. I therefore find that the tenancy was month-to-month at the time the N12 notice was given, and the N12 notice was valid.

Compensation

30. The Landlords have compensated the Tenants an amount equal to one month's rent by October 31, 2022. In particular, The TK stated that the Tenants did not pay the rent starting in July 2022, and on October 31, 2022 they sent a text message to ND informing him that one month of the existing rent arrears would be forgiven as a compensation. ND confirmed that as of October 31, 2022 the Tenants did have at least one month's rent arrears.

Order Sought

31. The Landlords seeks an order terminating the tenancy and evicting the Tenants. KN submitted that the Landlords have established a genuine intention for themselves and their family to occupy the rental unit for at least one year, and the Tenants have been aware of this intention since May 2022. She also submitted that there is not an adequate evidentiary foundation for me to find that there was a three-year term extension agreed to between the parties in 2021, even if that was the Tenants' belief or understanding. KN submitted that an order terminating the tenancy and for immediate eviction is appropriate.
32. The Tenants' submission was that the audio recording would reveal an agreement to a three-year term that commenced in September 2021, and that the Landlords are trying to back out of it. If this is correct, then the application would have to be dismissed. The Tenants asked that I listen to the recording in its entirety.
33. As described above, I find that the Landlords have proven on a balance of probabilities the grounds for termination of the tenancy and the claim for compensation in the application.

Section 83

34. ND stated that they have their children in school, and their middle child is attending Sheridan. He also stated that they have lived in the rental unit for 16 years and numerous services and professionals used by the Tenants are nearby, including doctors and dentists. ND also stated that he is a contractor and the majority of his work is in the area of the rental unit, and that MD's workplace is only five minutes away. The Tenants were not able to estimate how long they would need to find other accommodation if the tenancy is terminated.
35. The Landlords' circumstances relevant to section 82 are described above. Their current living accommodation does not meet their needs. They live in a two-bedroom apartment with their two adult sons and daughter-in-law, and intend to move into the rental unit as soon as they have vacant possession of it.
36. This is a long-term tenancy, and while the Landlords' application is granted, it is not unfair to delay eviction so the Tenants have adequate time to find other living accommodation. I understand the Landlords' position that they Tenants have known of the Landlords'

intention to occupy the rental unit themselves since May 2022, but the Tenants would not have known for certain that they would have to move until receiving this order.

37. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), and find that it would not be unfair to postpone the eviction until July 31, 2023 pursuant to subsection 83(1)(b) of the Act.
38. The Tenants were required to pay the Landlords \$15,741.37 in daily compensation for use and occupation of the rental unit for the period from November 1, 2022 to April 20, 2023.
39. Based on the Monthly rent, the daily compensation is \$92.05. This amount is calculated as follows: \$2,800.00 x 12, divided by 365 days.
40. The Landlords collected a rent deposit of \$1,825.00 from the Tenants and this deposit is still being held by the Landlords. Interest on the rent deposit, in the amount of \$475.50 is owing to the Tenants for the period from September 6, 2007 to April 20, 2023.
41. In accordance with subsection 106(10) of the *Residential Tenancies Act, 2006*, (the 'Act') the last month's rent deposit shall be applied to the rent for the last month of the tenancy.

It is ordered that:

1. The tenancy between the Landlords and the Tenants is terminated. The Tenants must move out of the rental unit on or before July 31, 2023.
2. If the unit is not vacated on or before July 31, 2023, then starting August 1, 2023, the Landlords may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
3. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlords on or after August 1, 2023.
4. The Tenants shall pay to the Landlords \$13,440.87, which represents compensation for the use of the unit from November 1, 2022 to April 20, 2023, less the rent deposit and interest the Landlords owes on the rent deposit. Any amounts paid by the Tenants to the Landlords for this time period shall also be deducted from this amount.
5. The Tenants shall also pay the Landlords compensation of \$92.05 per day for the use of the unit starting April 21, 2023 until the date the Tenants moves out of the unit.
6. The Landlords or the Tenants shall pay to the other any sum of money that is owed as a result of this order.

May 31, 2023

Date Issued

Mark Melchers

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 of the Tenants expires on December 12, 2023 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.