



**Order under Section 31
Residential Tenancies Act, 2006**

Citation: Macleod v Mitchell, 2023 ONLTB 33406

Date: 2023-05-29

File Number: LTB-T-002732-22

In the matter of: BASEMENT, 93 JEFFCOAT DR
ETOBICOKE ON M9W 3B9

Between: Kelsey Macleod Tenant

And

Carl Mitchell Landlord

Kelsey Macleod (the 'Tenant') applied for an order determining that Carl Mitchell (the 'Landlord') harassed, obstructed, coerced, threatened or interfered with the Tenant.

The Tenant also applied for an order determining that the Landlord failed to meet the Landlord's maintenance obligations under the *Residential Tenancies Act, 2006* (the 'Act') or failed to comply with health, safety, housing or maintenance standards.

This application was heard by videoconference on March 21, 2023.

The Tenant, the Landlord, the Landlord's Representative, Joseph Kazubek, and the Landlord's Witness, Patricia Anderson, attended the hearing.

Determinations:

1. The Tenant has applied for an order determining that the Landlord harassed the Tenant by verbally abusing the Tenant on November 25, 2021, and by filing two notices of termination to the Tenant in retribution for ongoing plumbing issues. (T2 Application)
2. The Tenant is also seeking an order determining that the Landlord breached section 20(1) of the Act by failing to repair a plumbing issue in a timely manner. (T6 Application)

Background

2023 ONLTB 33406 (CanLII)

3. The rental unit is a basement unit in a house. The Landlord and his family live on the main floor of the rental complex. The tenancy began on October 1, 2014. The rent at the time the applications were filed was \$1,183.68/month.
4. The Tenancy terminated January 28, 2022. The Tenant testified that she moved out of the rental unit pursuant to an N12 that had been served to the Tenant in 2021.
5. The Tenant filed the applications with the Board on January 24, 2022.
6. The rental unit is a basement unit in a house. The Landlord occupies the main floor of the house.

T6 Application

Tenant's evidence

7. The Tenant testified that prior to May 28, 2021, she had been experiencing slow drainage in her sinks and bathtub. The Tenant stated that she had notified the Landlord of the slow drains, but nothing was done.
8. On May 28, 2021, sewage began backing up the bathtub drain and the toilet as well as a floor drain in the furnace room. The sewage overflowed the bathtub and the toilet. The Tenant stated that she had to clean the sewage herself.
9. The issue was reported to the Landlord and the Landlord had a plumber come to the unit and clear the drain with a drain auger later that same day.
10. The drains in the unit once again backed up and overflowed on July 8, 2021. The Tenant discovered raw sewage in her bathtub and overflowing her toilet. The Tenant attempted to plunge the toilet, but it did not fix the problem. The Tenant was unable to clean because she had no place to empty the pails of cleaning water and sewage since the drains were not functioning. When she informed the Landlord of the problem, the Landlord initially stated that he could have a plumber attend to the unit on July 12, 2021, however when the Tenant stated her dissatisfaction of that response, the Landlord hired a plumber to attend on July 9, 2021.
11. The Tenant testified that the drain backed up several other times: July 22, October 14, October 24, October 27, October 28, and from November 1 to 3, 2021. For each of those instances, the Landlord only hired a plumber to come clear the drain with a drain auger, which proved to be only a temporary solution.
12. The Tenant was told by one of the plumbers on July 22, 2021, that there was an obstruction in the drain, likely a tree root, that would require extensive repair to properly fix. The Tenant stated that this information was communicated with her on the other dates when a plumber was required to attend to the unit. The Landlord acknowledged that as of October 29, 2021, tree roots were confirmed to be growing through the clay drain and that was the main issue regarding the clogged drain.

13. The Tenant testified that with no working drain, she could not reside in the rental unit from November 1 to November 3, 2021, because the Landlord was unable to get a plumber in to repair the drain until November 3, 2021.
14. The Tenant stated that another drain back up occurred on November 22, 2021, however this time the Landlord refused to have a plumber come to the unit because the drain was to be permanently fixed on November 30, 2021.
15. The Tenant stated that from November 30 to December 2, 2021, she was unable to use her rental unit because the drains were not functional due to the repairs being made to the drain.
16. The Tenant testified that due to the drain issues that occurred over the 6-month period, she was unable to use her rental unit for 14 days. During these times, the Tenant stayed with family.
17. The Tenant also expended time cleaning up after the sewage overflow, and in the process having items such as towels, carpets and a bathmat ruined by the sewage.

Landlord's evidence

18. The Landlord did not contest any of the Tenant's evidence regarding either the dates that floods or backups occurred or the reason for the flooding. The Landlord did testify that he was diligent in responding to the Tenant's complaints about the sewage backups.
19. The Landlord testified that the blockage was in part, caused by the tree roots growing through the clay drainpipe. However, there was also a calcium build-up around the area where the drain from the property enters the municipal sewer system that played a part in restricting the flow of sewage from the Landlord's property into the municipal system.
20. The Landlord stated that in late October 2021 he received two quotes to fix the drain/tree root issue: one from Enercare for \$27,000.00 which would permanently fix the issue, and one from Super Rooter for \$3,100.00 which would only temporarily fix the issue. No other estimates were submitted as evidence.

Analysis

21. Section 20(1) of the Act states:

A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.

22. In *Onyskiw v. CJM Property Management Ltd.*, 2016 ONCA 477, the Court of Appeal held that the LTB should take a contextual approach and consider the entirety of the factual situation in determining whether there was a breach of the landlord's maintenance obligations, including whether the landlord responded to the maintenance issue

reasonably in the circumstances. The court rejected the submission that a landlord is automatically in breach of its maintenance obligation as soon as an interruption in service occurs. In this case, this issue is whether the Landlord responded reasonably when the drain back-up/flooding was first reported to him and if he then properly addressed the problem in a timely and reasonable manner.

23. “Latent defect” is described by the Dictionary of Canadian Law (third edition) to be “One not discoverable on casual inspection and not observable; A defect which a reasonably careful inspection will not reveal...” The issue here is whether the initial flood that occurred on May 28, 2021 was the result of a latent defect which could not have been reasonably discovered by the Landlord prior to flood.
24. Pursuant to *McQuestion v. Schneider*, 1975 CanLII 764 (ON CA), [1975] O.J. No. 2279 (C.A.), a landlord is not liable for the damage caused by an incident caused by a latent defect. Instead, a landlord’s liability arises where the landlord fails to take reasonable measures to correct the latent defect, or otherwise minimize the tenant’s losses, once the defect becomes apparent.
25. I accept that the Landlord’s evidence about the likely cause of the repeated sewage backups and recognize that the tree roots growing through the clay drainpipe and the calcium build-up are circumstances beyond the Landlord’s control.
26. However, the Tenant testified that she had reported issues of a slow drain to the Landlord prior to the drain backing up on May 28, 2021. The Landlord did not deny that this issue was brought to their attention, and therefore I accept that the Landlord had been given reasonable notice prior to May 28, 2021 that there was a drainage issue to be investigated. No evidence was submitted that the Landlord investigated the Tenant’s complaint at any time prior to May 28, 2021. Had the Landlord taken the reasonable step of investigating this issue and responded appropriately it is entirely possible the flood could have been prevented. Therefore, I find that Landlord cannot escape liability for the damage caused by the initial flood on May 28, 2021 based on the “latent defect” principle.
27. I also find that after the first flooding event occurred on May 28, 2021, the Landlord did not adequately address the problem, which resulted in additional flooding incidents. After each of the many sewage back-ups the Landlord’s response was to have a plumber clear the drain with a drain auger. Although this would temporarily restore function of the drain, it would not resolve the underlying problems causing the repeated flooding.
28. Pursuant to section 20(1) of the Act, a landlord is responsible for maintaining a rental unit in a good state of repair and keeping it “fit for habitation”. This means that any repairs a landlord undertakes must not just be done in a timely manner but must also be effective addressing the cause of the problem. The Landlord did not submit any evidence that he had sought to fix the underlying cause of the problem until it was investigated at the Landlord’s behest on October 28, 2021, and then did not proceed with the actual repairs until November 28, 2021.

29. The Tenant testified that the plumber who cleared the drain on July 22, 2021, gave her an assessment that there was a blockage, likely by a tree root, further down the drain. The Landlord did not submit any evidence to counter this claim, such as deny that the plumber had given them this information.
30. I find that, on a balance of probabilities, a plumber would have relayed that same information to the Landlord, especially since the Landlord is the one employing the services of the plumber. At the point that the Landlord was informed that the roots were blocking the drain, it became the Landlord's responsibility to further investigate the plumber's assessment and act on it accordingly. However, the Landlord's actions show that he preferred to use temporary remedies to deal with the flooding issue until the flooding issues became more frequent in the fall of 2021.
31. Therefore, I find that for every flooding incident that occurred after July 22, 2021, the Landlord breached section 20(1) of the Act because he failed to employ effective maintenance to address the problem.
32. No evidence was presented at the hearing that would suggest that the Landlord was made aware of any potential drainage issues, such as tree roots, prior to July 22, 2021. I find that it would have been reasonable for the Landlord to believe that the drain clearing completed by the plumber on May 28, 2021, would have resolved the issue. Therefore, find that the one flood that occurred on July 22, 2021, was not a breach of section 20(1) of the Act.
33. The Tenant testified that she cleaned up her unit after each flooding event, and not the Landlord. Since the Tenant was not at fault for any of the flooding, it was the Landlord's responsibility for the clean up of the rental unit after the flooding events. The Landlord failed to initiate the clean up in a reasonable amount of time or compensate the Tenant for her work in cleaning up her unit after the flooding, which constitutes a further breach of section 20(1) of the Act.
34. The Tenant also stated that due to the flooding that she was unable to use her rental unit from November 1 to November 3, 2021, because of the Landlord's delay in having the drain cleared. At the hearing, the Landlord did not give any evidence for why it took over three days to at least have the drain cleared again with the drain auger to, at very least, have functionality of the drain restored. I find this delay to be unreasonable, and therefore a breach of section 20(1) of the Act.
35. From November 22, 2021, to December 2, 2021, the Landlord was aware of another drain clog. The Tenant testified that after having reported the clog to the Landlord on November 22, 2021, the Landlord refused to send a plumber to clear the drain because the drain was scheduled to be permanently fixed on November 29, 2021. This means that during that whole week, the Tenant did not have a functioning drain and was unable to use her rental unit. Furthermore, the repairs were not completed until December 2, 2021.
36. I find that a reasonable Landlord would have employed the temporary solution of having a plumber clear the drain again with an auger on November 22, 2021, so that use of the

rental unit could be restored, however, the Landlord chose not to go this route. Therefore, I find the Landlord breached section 20(1) of the Act by failing to address the drainage issue on November 22, 2021.

Remedies

37. The Tenant is seeking the following remedies on the T6 application:

- a) Rent abatement of \$8,285.76 (rent was \$1,183.68/month)
 - a. Six months of 100% rent abatement
 - b. One month for pain and suffering
- b) Rent differential of one year \$916.32 per month or \$10,995.84.

38. The Tenant stated she was unable to use her unit as a whole due to the failure of the drains to work properly for a period of 14 days. The failure of the drains and resulting flooding would render the unit unlivable. The Tenant would not be able to use a sink, washroom or any other part of her unit that required drainage. Based on the testimony before me, I find that a 100% rent abatement for those 14 days, or \$544.82 is fair in these circumstances.

39. I also find that on the other days where the Tenant did not vacate the unit, the Tenant shall be awarded a lump sum of \$2,500.00. This takes into the consideration the lack of functionality of the drains that the Tenant dealt with throughout the tenancy that did not require the Tenant to vacate the unit. This award also considers the time taken by the Tenant to clean her unit after the flooding, despite it being the Landlord's responsibility to do so.

40. Pursuant to section 30(1) of the Act, the Board may make an award that the Board deems fit. Although general damages are not a listed remedy on a T6 application, I find that the Tenant's remedy of one month of rent due to stress and undue hardship caused by the Landlord's breach of section 20(1) of the Act are reasonable under these circumstances. Therefore, I find that the Tenant shall be also awarded \$1,183.68 in general damages.

41. Although, an award for rent differential is not generally awarded based on a T6 application, the Tenant did not make any submissions regarding the rental unit she moved to after this tenancy terminated. Therefore, a remedy for rent differential is denied.

T2 Application

Testimony- November 25, 2021

42. The Tenant testified that on November 25, 2021, the Landlord had a plumber come into the unit to replace a toilet. When the plumber entered the unit, the Landlord's mother, Patricia Anderson (PA), entered as well.

43. The Tenant's claim is that the Landlord's mother had no reason or right to be present, since the notice given to the Tenant for entry did not address her entry into the unit with the plumber.
44. The Tenant stated that PA entered the unit without her consent. She also stated that she did not observe the plumber give consent to PA to enter the unit.
45. The Tenant stated that PA entered the unit and flushed the toilet repeatedly despite being told not to by the plumber. The Tenant then stated that PA became hostile towards both her and the plumber. The Tenant accused PA of raising her voice at her and blaming her for the flooding/drainage issues.
46. The Tenant stated that at one point both she and the plumber told her to leave, however as PA left, she continued to holler at both the Tenant and the plumber.
47. PA's testimony gave a different perspective. PA stated that she was surprised at the Tenant's allegations because she thought she had been respectful of both the Tenant and the plumber in the unit.
48. PA testified that she had called down to the unit and asked if she could come in , and that the Tenant gave her permission to enter.
49. Regarding the toilet bowl, PA observed that the toilet bowl had bubbling water in the bowl itself (symptom of poor drainage) and PA had brought it to the attention to the plumber that this was occurring.
50. PA testified that the only time it became tense in the Tenant's apartment was when she had pointed out the bubbling, and the plumber asked her, "Are you a plumber?".
51. PA stated that her interactions with the Tenant were cordial and even friendly throughout the whole event.
52. The Tenant did not challenge PA's testimony, despite the many contradictions of the recollection of the event between the two parties.

Analysis- November 25, 2021

53. Pursuant to section 23 of the Act, a landlord shall not harass, coerce or threaten a tenant. The term harassment is not defined in the Act, however, Board Interpretation Guideline 6, Tenant Rights, provides a summary of the Board's jurisprudence and indicates that the Board has often adopted the following or similar definitions: "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome."
54. The testimony given by the Tenant and PA regarding the event on November 25th is very different. However, when PA's testimony clearly contradicted the Tenant's testimony, the Tenant did not challenge the credibility or reliability of PA's evidence. Based on the lack

of any challenges to PA's evidence, I can only assume that the Tenant did not find any fault with the testimony.

55. The onus is on the Tenant to prove these allegations on the balance of probabilities. The Board has heard two submissions of evidence that tell of the same incident (plumber changing a toilet) but are vastly different in comparison to how the events unfolded on November 25th. Since the onus is on the Tenant, I would have needed more evidence, such as the witness account from the plumber, to tip the scales in the Tenant's favour. In the end, this has become one person's word against another's. Therefore, based on the evidence before me, I am not satisfied that PA either entered the rental unit illegally, or harassed the Tenant on November 25, 2021.

Service of N5 and N12 & Reprisal

56. The Tenant alleged that the Landlord served two notices, an N5 and an N12, in retribution for her complaints about the drainage issue.
57. The Tenant had testified that she had moved out of the rental unit pursuant to the N12 served to her in December 2021, however, she believed that she was served it because she had complained about the drainage issues.
58. The Landlord testified that the N12 was served because the Landlord wanted to take over the rental unit for his, and his family's own use. This would make the Landlord and his family the sole occupiers of the rental complex.
59. The Landlord testified that there have been no other tenants in his house since the Tenant vacated the unit.
60. The issue of good faith of the N12 is generally challenged at the L2 hearing pursuant to the N12 served, or by filing a T5 application with the Board. However, here the Tenant is arguing that the N12 was served based solely on retribution for getting the Landlord to deal with the drainage issue.
61. I find that any association between the drainage issues and the issue of the N12 to be coincidence and any accusations of retribution to be based on speculation.
62. The Tenant had stated that she had been served an N5 for the drainage issues, having been accused by the Landlord of flushing objects down the drain that she was not supposed to be flushing down. The N5 demanded that she pay for damages of \$3,726.74 for the repair of the drain or that she would be evicted after 14 days.
63. The Landlord presented photos from the plumber showing that the drain had been cleared of feminine hygiene products. However, under further examination, the Landlord admitted that that this clog was not in the Tenant's drain system, but in the complex's drain system, a few feet into the stack. This means that it could also have come from someone else in the complex.

64. The Landlord testified that they believed at the time that the Tenant had flushed these items down the drain, but also stated that they had not proceeded with filing an L2 application to enforce the notice. Although at the time they believed to be justified in serving the Tenant the notice, they would later realize that the notice would fail at a hearing. Therefore, they did not file an L2 to enforce the N5 notice.
65. I find that the N5 was served in a reaction to a clog found in their drain that they, at the time, believed to be caused by the Tenant's actions. Although, based on the evidence before me, this would have been an ill-advised notice to give the Tenant and would likely have failed if brought before the Board, there is no evidence before me that the N5 was served for an improper purpose such as to harass the Tenant.
66. I find that the Tenant has not met the burden of proof required for me to find that the service of the N5 and N12 meet the definition of harassment. Therefore, this claim, and the whole of the T2 application, is dismissed.

It is ordered that:

1. The tenancy between the Landlord and the Tenant terminated January 28, 2022.
2. The total amount the Landlord shall pay the Tenant is \$4,276.50. This amount represents:
 - \$3,044.82 for a rent abatement.
 - \$1,183.68 in general damages.
 - \$48.00 for the cost of filing the application.
3. The Landlord shall pay the Tenant the full amount owing by June 9, 2023.
4. If the Landlord does not pay the Tenant the full amount owing by June 9, 2023, the Landlord will owe interest. This will be simple interest calculated from June 10, 2023, at 6.00% annually on the balance outstanding.
5. The Tenant has the right, at any time, to collect the full amount owing or any balance outstanding under this order.
6. The Tenant's T2 application is dismissed.

May 29, 2023

Date Issued

Robert Brown

Member, Landlord and Tenant Board

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If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.