



**Order under Section 9(2)
Residential Tenancies Act, 2006**

Citation: Norg v Walsh, 2023 ONLTB 32275

Date: 2023-04-27

File Number: LTB-L-010307-23

In the matter of: Bedroom - Main Level, 510 Geneva St St.
Catharines On L2N2H6

Between: Allison Norg Landlord

And

David Andrew Walsh Tenant

Allison Norg (the 'Landlord') applied for an order to determine whether the *Residential Tenancies Act, 2006* (the 'Act') applies.

This application was heard by videoconference on April 12, 2023.

The Landlord Allison Norg and the Landlord's Legal Representative Robert Barber and the Tenant David Andrew Walsh attended the hearing.

For clarity, I have referred to the parties as Landlord and Tenant.

Determinations:

1. The issue to be determined by the Board is whether the tenancy agreement between the parties is bound by the *Residential Tenancies Act, 2006* (the "Act"). The Landlord asserts the Act exempts the tenancy while the Tenant takes the position that the Act applies.
2. Section 3(1) of the Act sets out the application of the Act and provides the following:

This Act applies with respect to rental units in residential complexes, despite any other Act and despite any agreement or waiver to the contrary.

3. However, not all living accommodations are governed by the Act. Section 5 of the Act specifically identifies a series of exempt living accommodations. In particular, section 5(i) provides the following exemption:

This Act does not apply with respect to,

(i) living accommodation whose occupant or occupants are required to share a bathroom or kitchen facility with the owner, the owner's spouse, child or parent or the spouse's child or parent, and where the owner, spouse, child or parent lives in the building in which the living accommodation is located;

4. The living accommodation is a home located at 510 Geneva Street in St. Catharines, Ontario. There is a main floor and a basement. The main floor has three bedrooms in addition to the area occupied by the Landlord. The main floor also has a bathroom and a kitchen as well as a main living area. The basement has one bedroom, a bathroom and recreation and living space.
5. It was not disputed the Tenant moved into the home on December 1, 2021 and resided in the home for approximately 15 months. The Tenant vacated the premises on March 22, 2023. He also provided the Landlord with an N9 Notice to vacate effective April 15, 2023.
6. The Tenant submitted a floor plan illustrating the layout of the home. The Landlord adopted the illustration and entered it into evidence.
7. There was no dispute the Landlord and Owner Ms. Norg, lives in the home. The Landlord's evidence was her private living space contains a three-piece bathroom and a "pared down" kitchen.
8. The Tenant rents one of the bedrooms on the main floor, which is across from the main floor bathroom.
9. The Landlord's evidence was that apart from the bedrooms and her private living space, the remainder of the home is shared space. This includes the main floor bathroom and kitchen which were identified in green on the floor plan that was submitted. The Landlord testified this has been the case since Mr. Walsh moved into the unit and have not changed.
10. The Landlord submitted a copy of the rental agreement. The form used was the Standard Form of Lease. The Landlord's evidence was she used this document as it provided for much of the required information.

11. The rental agreement specifies the unit as “Bedroom-Main Level” at 510 Geneva Street in St. Catharines, Ontario. Section 6 of the agreement contains the following wording:

This agreement covers the rental of the bedroom specified. Provision for use of the shared kitchen, living room and bathroom is also included where designated personal space will be provided for personal items.

12. It was not disputed the agreement was signed by Mr. Walsh on November 18, 2021 and by Ms. Norg on November 19, 2021.
13. The rental agreement also contains additional terms under section 15 of the agreement. The additional terms set out:

It is shared accommodation, with the Landlord living on-site, with shared access to laundry, kitchen and bathrooms.

14. It was not disputed these additional terms were also signed to by Mr. Walsh on November 18, 2021 and by Ms. Norg on November 19, 2021.
15. The Landlord’s evidence was the bathroom contained in the main living area contains a bathtub while the bathroom in her living space does not. Her evidence was she uses the bathtub and does not ask anyone for permission to use it.
16. The Landlord testified the main floor kitchen contains a larger microwave than she has in her private living space. Her evidence was she uses the microwave as well as some of the cooking utensils such as pots and pans since her area does not have room for these items.
17. The Tenant’s evidence was over the 15 months he lived at the home the Landlord primarily used only the shared laundry facilities. It was his evidence that he works from home and never saw the Landlord prepare a meal in the main floor kitchen. He acknowledged some of the items in the kitchen are shared.
18. Mr. Walsh testified he was the only one that used the main floor bathroom on a daily basis. His evidence was he was aware the Landlord had used this bathroom to clean her hands. On cross examination, the Tenant acknowledged the Landlord used the main floor bathroom “once or twice” during a period of renovations. He further acknowledged the Landlord did not ask his permission prior to using the main floor bathroom.
19. The Tenant testified the Landlord was not required to use the kitchen or bathroom since she had these facilities within her private living area. His position was that since the Landlord had access to the kitchen and bathroom and did not use them, there was no requirement on the part of the Landlord to use either facility.

20. The Tenant's evidence was that notwithstanding the signed rental agreement he spent much of his time living at the home trying to figure out the living arrangements. The Tenant did not elaborate as to why this was.
21. When the Tenant was asked if the Landlord had the right to access the main floor kitchen and bathroom without asking permission, the Tenant responded that he did not know. He stated there is a difference between access and use.
22. The Tenant was asked if the Landlord could have used the main floor kitchen and bathroom when the Tenant was not present at the home. Mr. Walsh responded that he could not speak to that and did not want to speculate.
23. Mr. Walsh testified the Landlord had served him with an N12 Notice of Termination, illustrating the Landlord believes the Act governs the tenancy. He did not submit a copy of the N12 Notice into evidence and chose not to cross examine the Landlord.

Analysis

24. The fact the Landlord has their own private kitchen and bathroom does not mean the Tenant is not required to share the kitchen and bathroom he has access to. The Ontario District Court, in the case of *Kutzak v. Gauthier* [1988] O.J. No. 1033, a matter decided under a similarly worded exemption clause found in Part IV of the *Landlord and Tenant Act* R.S.O. 1980 ch. 232. determined that the fact there is more than one kitchen or bathroom in a living accommodation is not determinative of the requirement to share issue:

“...I hold that the phrase “required to share” is wide enough to embrace an occupancy where the occupant is required to share his bathroom or kitchen with the owner even though the owner has separate facilities. That the owner has separate facilities is not determinative. If the Legislature had intended to limit the exclusion to single kitchen and bathroom facilities, it would have expressly said so. I am strengthened in this view by the wording in Section 1(c)(v) which refers not to the bathroom or kitchen facility but to a bathroom or kitchen facility. While this interpretation can lend itself to abuse, the Court will look at the substance, not the formality of the arrangement. In short, the bona fide intention of the parties as gleaned from their words and conduct is critical. Each case will pivot on its own facts.”

25. Section 5(i) of the Act exempts living accommodation in which the occupant is required to share a kitchen or bathroom with the owner when the owner actually lives at the premises. The requirement places a proactive duty on the occupant to share the facility. It does not

place a proactive duty on the Landlord to share their private kitchen or bathroom should they have them. As a result, I reject the Tenant's argument that because the Landlord has separate facilities there exists no requirement to use the main floor kitchen or bathroom. In my view, this misinterprets the meaning of the section 5(i) of the Act.

26. I am satisfied on a balance of probabilities the Landlord, over the course of the tenancy, has used the kitchen and bathroom located on the main floor area of the home. I base this finding on the evidence of both parties. While the precise frequency in which the Landlord used the kitchen and bathroom cannot be determined, I do not find it reasonable to expect anyone to keep records of when they use such facilities. Further, the legislation does not require a minimum amount of usage to trigger the exemption contained in section 5(i) of the Act.
27. On the evidence of both parties, I am convinced the Landlord used these facilities from time to time on a sporadic basis. I find this usage to be in keeping with the spirit of the rental agreement the parties signed. The requirement to share the facilities is contained in two areas of the agreement. They are not hidden or mixed amongst other lengthy conditions. The requirement existed from the outset of the living arrangement and did not change while he resided at the home.
28. The Tenant provided no explanation as to how he could have understood the agreement differently. I did not find his assertion that he was discovering the nature of the tenancy as he went along, to be persuasive. I do not find the Landlord's choice of form for the rental agreement to be evidence the parties intended the Act to apply, particularly since the conditions contained in it specifically attract an exemption.
29. The Tenant's testimony that he was served an N12 Notice of Termination was unconvincing. He submitted no copy of the Notice and asked the Landlord nothing about it when he had an opportunity to do so. I am not convinced on a balance of probabilities an N12 Notice was served by Ms. Norg on Mr. Walsh.
30. When I consider all the circumstances and evidence presented, I am satisfied on a balance of probabilities Mr. Walsh was required to share a kitchen or bathroom with Ms. Norg. They both signed their names to an agreement that stipulated precisely this. They both gave evidence that the Landlord did in fact use the facilities Mr. Walsh was required to share, albeit infrequently. I find that the intention of the parties was clear. Therefore, the frequency with which the facilities were shared becomes much less important, if not irrelevant. The Landlord had access at all times to the shared facilities and made use of them. As a result, I find the Landlord has met their burden on this application.
31. This order contains all the reasons for the decision. No other reasons will be issued.

It is ordered that:

1. The Act does not apply.

April 27, 2023

Date Issued

John Cashmore

Member, Landlord and Tenant Board

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