Order under Subsection 87(1)
Residential Tenancies Act, 2006

Citation: Mercier v Frost, 2023 ONLTB 29915
Date: 2023-04-20
File Number: LTB-L-074038-22
(HOL-08204-20)

In the matter of: Main Floor, 2440 Albert Street W Rockland
ON K4K0C4

Between: Bernard Mercier and Gisele Mercier — Landlords

And

Krista Bullis and Matthew Frost — Tenant

Your file has been moved to the Landlords and Tenant Board's new case management system, the Tribunals Ontario Portal. Your new file number is LTB-L-074038-22.

Bernard Mercier and Gisele Mercier (the 'Landlords') applied for an order requiring Krista Bullis and Matthew Frost (the 'Tenant') to pay the rent that the Tenant owes.

This application was heard by videoconference on October 3, 2022.

The Landlords and the Tenants attended the hearing. The Tenants were represented by Samuel Gauthier.

Determinations:

PROCEDURAL HISTORY

1. The parties first appeared before the Board on November 4, 2020. At this hearing, both parties were present, and I began to hear the Landlords' evidence with respect to the application for rent arrears before adjourning the matter due to insufficient time. An interim order was issued requiring ongoing rent payments to the Landlords until the matter is resolved.

2. The next time the parties appeared before the Board was on May 3, 2021. At that hearing, all parties were present, and I proceeded to hear the preliminary issues raised by the Tenants and the Tenants' claims pursuant to section 82 of the Act before adjourning the matter due to insufficient time. At this hearing, the Tenants' retained SG.

3. The next appearance by the parties before the Board was on September 2, 2021. At this hearing, all parties were present, and I continued to hear the Tenants' claims under section 82 of the Act as well as the Landlords' response before adjourning the matter due to insufficient time.

4. The final time the parties appeared before the Board was on October 3, 2022. At this hearing all parties were present, and I heard evidence from the Landlords about the Tenants' claims as well as the submissions from all parties.

PRELIMINARY ISSUES

A. Tenants' Adjournment Request: November 4, 2020

5. At the hearing on November 4, 2020, the Tenants sought an adjournment as he disputed the arrears outstanding as claimed by the Landlords and required time to obtain his evidence. The Tenants testified that they only received the notice of hearing on October 26, 2020 and were only able to speak with the bank before the hearing.

6. The Landlords opposed the adjournment request as they felt it was an attempt by the Tenants to delay the eviction process.

7. The Board's records show the notice of hearing was served to the parties on October 23, 2020. The Tenants confirmed receipt three days later. This still gave the Tenants nine days to obtain evidence.

8. The N4 notice of termination that forms the basis of the L1 application outlines the Landlords' claim from rent arrears going back to December 2019 – this was served August 14, 2020. Thus, I find that the Tenants have been aware since August 2020 of the Landlords' claim and has therefore had sufficient time to obtain his evidence before the hearing date.

9. As such, the Tenants' request to adjourn was denied and I proceeded to hear the application.

B. Tenants' Request to Convert the Application from L1 to L9

10. At the hearing on May 3, 2021, the Tenants' representative advised the Board that the rental unit had been sold and that the named Landlords were no longer the Landlords of the rental unit. As such, the application should be converted to an arrears only application, without eviction.

11. The (now former) Landlords confirmed that the house had been sold and that the current Landlords took over on April 3, 2021, after the L1 application was filed. While the last month rent deposit was transferred to the new Landlords, the arrears for the period ending March 31, 2021 were not. As such, the applicant Landlords, who is now the former Landlords, seeks an order only for the arrears that are owed to them.

12. The definition of "Landlord" in subsection 2(1) of the Act reads as follows:

> "Landlord" includes:
>
> a) the owner of a rental unit or any other person who permits occupancy of a rental unit, other than a tenant who occupies a rental unit in a residential complex and who permits another person to also occupy the unit or any part of the unit,
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> …

13. Section 18 of the Act says: "Covenants concerning things related to a rental unit or the residential complex in which it is located, run with the land, whether or not the things are in existence at the time the covenants are made." It is commonly accepted that what this provision means is that when a property is sold and there are sitting residential tenants, the tenancy agreements "run with the land" meaning they remain in place on the same terms and conditions as existed prior to the sale. The new owner steps into the shoes of the old Landlords.

14. The primary purpose of the provision was to abolish the common law distinction between covenants *in esse* (which ran with the land) and covenants *in posse* (which did not). At common law examples of covenants which have always been said to run with the land include the obligation to pay rent and the Landlord's obligation to provide the tenant with quiet enjoyment. As a result of section 18 of the Act it is quite commonplace for successor Landlord's to bring applications for arrears of rent where the arrears of rent owing cover the period both before (that they have inherited) and after the sale.

15. In this case, based on the evidence before the Board I find that the applicant Landlords is entitled to an order for the arrears that are owing to them. I say this because at the time the application was filed, on September 1, 2020 the former Landlords was still the Landlords in accordance with the definition under the Act. Further, the arrears being claimed by the (now) former Landlords are owed to them and have not transferred to the new Landlords.

16. As such, the application is amended accordingly. <u>C. What is the Lawful Monthly Rent?</u>

17. On May 3, 2021, the Tenants also raised a preliminary issue with respect to the lawful monthly rent as they submit the notice of rent increase which was effective April 1, 2020 is

defective as it fails to comply with the Act as it was not provided 90 days prior to the proposed increase date.

18. The Tenants testified that the letter dated January 28, 2020 advising them of the rent increase was only given to them on August 3, 2020.

19. The Landlords testified that the Tenants were emailed a copy of the notice of rent increase on January 30, 2020 – a copy of this email was submitted into evidence. In addition to that, while they do not recall specifically, it is possible that the Tenants received a paper copy from the first-named Landlords on or about January 28, 2020 – a copy of this notice was also submitted into evidence.

20. The Landlords submit the amount of the increase is below the guideline amount from $1,575.00 to $1,609.00. The Landlords also submit that the Tenants did not raise this as an issue at the hearing on November 4, 2020.

21. Section 116(1) of the Act outlines the requirements surrounding notices of rent increase and states:

> **116 (1)** A Landlords shall not increase the rent charged to a tenant for a rental unit without first giving the tenant at least 90 days written notice of the Landlords' intention to do so.

22. The problem here is that the Landlords notice of rent increase that took effect on April 1, 2020 did not comply with the Act and I find, therefore, that it is not a valid notice of rent increase.

23. Thus, I find that the rent remains at $1,575.00 for the period April 2020 – March 2021.

L9 APPLICATION

24. As of the hearing date, the Tenants were still in possession of the rental unit.

25. The lawful rent is $1,575.00. It is due on the first day of each month.

26. The arrears and costs owing to March 31, 2021 total $971.00.

27. The Landlords seek an order for the arrears and costs.

28. The Tenants disputes the arrears as claimed by the Landlords and believes the Landlords is missing a $400.00 payment made by the Tenants. However, no documentary evidence was submitted in support of this assertion.

29. Without positive evidence, it is very difficult to establish a negative claim. Thus, in order for the Tenants' claim to be successful, they must provide some positive proof of the disputed payment, which, I find, they did not.

30. At paragraph 26 of *F. H. v. McDougall, 2008 SCC 53 (CanLII)*, the Court found that the civil standard of proof requires that evidence "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test." Here I find the Tenants have failed to meet the required standard.

SECTION 82 CLAIMS

31. The Tenants also seeks an abatement, if not a full waiver of the arrears due the issues they experienced at the rental unit. The Tenants raised the following issues pursuant to section 82 of the *Residential Tenancies Act, 2006* (the 'Act'):

    a) Lack of heat at the rental unit;
    b) Flooding in the basement;
    c) Mould in the bedroom; and
    d) Non-functional Oven

32. Section 82(1) of the Act states:

> 82 (1) At a hearing of an application by a Landlords under section 69 for an order terminating a tenancy and evicting a tenant based on a notice of termination under section 59, the Board shall permit the tenant to raise any issue that could be the subject of an application made by the tenant under this Act if the tenant,
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> (a) complies with the requirements set out in subsection (2); or
>
> (b) provides an explanation satisfactory to the Board explaining why the tenant could not comply with the requirements set out in subsection (2).

33. I proceeded to hear the Tenants' claims under section 82 which were raised at the hearing on May 3, 2021.
34. Pursuant to subsection 29(2) of the *Residential Tenancies Act, 2006* and the principles found at paragraph 9 of *Toronto Community Housing Corporation v. Allan Vlahovich*, 2010 ONSC 1686, the limitation period cannot extend beyond May 4, 2020 with respect to any remedy. [9] …In light of the one year limitation period in s.29(2), the Board can only make a determination that a Landlords has breached an obligation under s.20(1) during the one year period before the making of the application. Accordingly, the remedy that may be granted may only be granted in relation to breaches during that one-year period. While evidence of events prior to the commencement of the one-year period may be admissible at a hearing before the Board, for example, to enable the Board to understand the cause of the disrepair, this does not permit the Board to extend the remedy back to a time prior to the commencement of the statutory limitation period.

35. However, given the suspension to limitation periods that occurred between March 16, 2020 and September 13, 2020 (pursuant to Ontario Regulations 73/20 and 457/20 under the

Reopening Ontario [A Flexible Response to COVID-19] Act, 2020, S.O. 2020, c. 17), with the enactment of Ontario Regulation 73/20, the Board is required to refrain from counting the days within the suspension period. Thus, issues and remedies as far as December 22, 2019 can be considered on this application.

D. Lack of Heat in the rental unit

36. The Tenants testified that they did not have adequate heat in the rental unit since winter of 2015; however, in spring of 2020, the heat stopped working completely. They testified that during the winter months, the heat remained at 16°C in the rental unit which was very cold for them and their five children – ages 14, 10,7,6,2. The Tenants testified that they reminded the Landlords every fall season that the heating was not working properly but that the Landlords failed to investigate their concerns further.

37. The Tenants testified that it was in conversation with the technician in November 2020, that they learnt that he had advised the Landlords of the issue in Spring of 2019 – however, the Landlords did nothing until after the hearing on November 4, 2020.

38. The Tenants testified that it was only on November 4, 2020, that the Landlords finally had the technician attend onsite, and repair the issue allowing heat to be controlled at the main floor unit. Since then, there have been no further issues with respect to the heating at the rental unit.

39. The Tenants submitted a photograph of the thermostat, which was operational, dated November 3, 2020 showing a temperature of 16.5°C. This was the day before the first hearing of this application. The Tenants also submitted a copy of the email to the Landlords dated August 1, 2020 in support of their assertion that they informed the Landlords of this issue that remained outstanding.

40. The Tenants seek a 30% rent abatement for the period April 2019 to November 2020 or $3,780.00 for the discomfort associated with being cold inside their home for the duration of their tenancy until the heating issue was fixed; they testified that they survived with five children in the cold every year which was uncomfortable and inconvenient for them. They testified that the Landlords did not offer any space heaters or other options to help them deal with the inadequate heat at their rental unit.

41. On cross-examination, the Tenants were unsure whether Brazeau Heating and Cooling attended on November 4, 2020, and whether they had said the battery was dead in the thermostat which was why the unit was not heating; the Tenants also do not recall the Landlords' recommendation to use the oven as a source of heat as a temporary measure. The Tenants confirmed that it was only when the systems were separated in November 2020 that the heating worked properly in their unit.

42. The Landlords testified that the heating issue was brought up on two separate occasions. Once, it was due to the thermostat battery being dead and requiring replacement – this

was in November 2020 and a copy of the text message and invoice for the work was submitted into evidence.

43. The Landlords testified that the second time this issue was raised by the Tenants was The second time it was raised was when they were away in Florida in December 2019. However, the Landlords contacted the technician who attended the rental unit the following month to address this issue. A copy of the invoices for the technician's attendance at the rental unit dealing with heat was submitted into evidence.

44. The Landlords submits the issue with the heating was resolved as quick as possible and that the Tenants' claim should be dismissed.

ANALYSIS

45. Subsection 2(1) of the Act defines "vital services" as follows:

> "vital service" means **hot or cold water**, fuel, electricity, gas or, during the part of each year prescribed by the regulations, **heat**.
>
> [Emphasis added.]

46. Subsection 4 of the Ontario Regulation 516/06 under the Act states: 4. (1) For the purpose of the definition of "vital service" in subsection 2 (1) of the

> Act, **September 1 to June 15 is prescribed as the part of the year during which heat is a vital service.**
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> (2) For the purposes of subsection (1), heat shall be provided so that the room temperature at 1.5 metres above floor level and one metre from exterior walls in all habitable space and in any area intended for normal use by tenants, including recreation rooms and laundry rooms but excluding locker rooms and garages, is **at least 20 degrees Celsius.**
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> [Emphasis added.]

47. Based on the evidence before the Board, I am satisfied that the Landlords' failure to ensure adequate heating in the rental unit constitutes the withholding of vital services and substantial interference with the Tenants' reasonable enjoyment of the rental premises. Thus, I find the Landlords was in breach of subsections 20(1), 21(1) and 22(1) of the *Residential Tenancies Act, 2006*.

48. I say this because the evidence before the Board supports the Tenants claim that the heating remained at 16°C which is below the legal requirement during the prescribed period and that there was no evidence to the contrary to show that any investigation that

took place in the rental unit to determine why the temperature was below the required amount.

49. As such, I find the Tenants are entitled to a remedy for this issue at the rental unit between December 22, 2019 to November 4, 2020 or 227 days.

50. Abatement of rent is a contractual remedy on the principle that if you are paying 100% of the rent then you should be getting 100% of what you are paying for and if you are not getting that, then a tenant should be entitled to abatement equal to the difference in value. It is the compensation to the tenant for the inadequate state of repair and or inconvenience or actual loss of use of the rental unit. In determining the amount of an abatement of rent, I must consider the impact on the Tenants.

51. In *Tenant of 328 Spring Garden Ave., Toronto v. Varki*, which was a case about the Landlords' failure to ensure adequate heat for a period of six weeks, the Courts found it appropriate to award a 20% rent abatement.

52. While the Tenants seek a 30% rent abatement, considering the case law above, and given my knowledge and experience in similar matters, I find it appropriate to award the Tenants a 20% rent abatement for the period specified above, or $2,351.72.

E. Flooding in the Basement

53. The Tenants testified that every year in the spring, there was a flood in the basement; while the basement did not form part of their rental unit, it was a common space where all tenants would do their laundry. The Tenants testified that the flood was never cleaned or pumped out, the water just evaporated on its own which resulted in flies and a foul, damp odour.

54. As a result, the Tenants testified that the washer and dryer were put on skids to avoid any damage to these machines. A picture of this was submitted into evidence in support of this assertion.

55. The Tenants testified that they also experienced flooding in their bedroom when the upstairs unit bathtub was leaking and informed the Landlords of this issue on June 26, 2019 – a copy of the text message was submitted into evidence in support of this assertion. However, it took the Landlords 10 months to fix this issue which resulted in the loss of the use of their bedroom space due to the leaking and mould that had subsequently accumulated.

56. The Tenants testified that once the Landlords fixed the issue, they no longer experienced flooding in their bedroom, however the basement flooding issue remained live. Several photographs of the wet basement were submitted into evidence in support of their assertion.

57. The Tenants seek compensation for the inconvenience of dealing with the flies and foul smell in the basement and the loss of the use of their bedroom for the period April 2020 to March 2021 in the form of a 15% rent abatement or $2,835.00.

58. The Landlords testified that he was aware of two instances of flooding in the basement – the first was an issue with the pipe was on the hot water tank. After this flood, the Landlords washed the basement twice with bleach. The Landlords submits this flood was out of the Landlords' control.

59. The second time the Landlords became aware of a flood in the basement was with respect to the sump pump flood which had to be replaced. The Landlords submits that the house was 100 years old and the basement had never been rented out to a tenant.

60. With respect to the flood in the bedroom, the Landlords submits that he had never been told that there was a flood in the bedroom, just that there was a leak and that he had sent three plumbers to deal with this issue as promptly as possible.

61. The Landlords seeks that the Tenants' claim be dismissed.

ANALYSIS

62. With respect to the flood in the basement, I find that the evidence is insufficient to establish that the Landlords was in breach of subsection 20(1) or 22(1) of the Act. I say this because while there is no dispute that there were at least two floods in the basement, the evidence before the Board suggests that they were due to circumstances beyond the Landlords' control – namely, a sump pump breakdown and a pipe issue.

63. While the Tenants' testified to the impact of these floods, namely that they omitted a foul odour and attracted pests (flies), the Landlords' evidence indicated that they cleaned the unit with bleach. Nothing further was presented by the Tenants to contradict the Landlords.

64. Furthermore, it is undisputed that the basement does not form part of the rental unit and is a common space.

65. As such, absent anything more, the Tenants' claim for this issue must be dismissed.

66. With respect to water in the bedroom, based on the evidence before the Board, including the text messages submitted by the Tenants I find that the Tenants suffered from a leak in their bedroom and not a flood. I find that the leak was first noticed in Jun of 2019 and repaired in December 2019 – although the date is not specified.

67. As the period falls outside of the remedy period pursuant to subsection 29(2) of the Act, and the date in December 2019 of the repair was not specified, this claim must also be dismissed.

F. Mould in the Rental Unit

68. The Tenants testified that related to the flood in the bedroom was the issue of the formation of mould; this was first raised by the Tenants to the Landlords on October 3, 2019; however, as of November 2, 2020 this issue was still not addressed.

69. The Tenants presented several text messages between the period October 2019 and January 2020 to demonstrate the fact that this issue remained outstanding, including conversations with the plumber to not have the baby sleep in the bedroom due to the mould.

70. The Tenants further testified that there was mould in the kitchen area as well and photographs of this were also submitted into evidence. As of the hearing date, this issue remains.

71. The Tenants seek a 15% rent abatement for the period April 2020 to March 2021 totalling $2,835.00 for this issue. The Tenants also seek that the issue of mould be addressed at the rental unit.

72. On cross-examination, the Tenants denied refusing entry to the contractors to attend the unit.

73. The Landlords submits that once the Tenants complained of mould, he arranged for contractors to attend the unit to address the issue as quickly as possible. The Landlords submits that the text messages demonstrate his prompt response and arrangement of the plumber to attend.

74. The Landlords also explains his difficulty where one of the plumbers refused to continue the job due to the mess at the rental unit and so the Landlords had to hire another person to address it.

75. The Landlords seeks that this claim be dismissed.

ANALYSIS

76. Based on the evidence before the Board, I am satisfied that the rental unit was in a state of disrepair as early as October 3, 2019, when the Tenants brought the issue of mould to the Landlords' attention. This is undisputed by the parties.

77. As such, I find that the Landlords was in breach of subsections 20(1) and 22(1) of the Act and are entitled to a rent abatement for this issue.

78. It is unclear why this issue has still not been addressed at the rental unit although the Landlords attempt to justify the delay due to contractors walking off the job. Therefore, I find that the Landlords failed to act in a timely and effective manner to address the issue of mould at the rental unit.

79. With respect to the remedy sought by the Tenants, given my knowledge and experience in other similar matters, I find it appropriate to grant the Tenants a 10% rent abatement for this issue for the period requested, or $1,890.70.

80. I also find it appropriate to order that this issue be resolved within 30 days from the date of this order, failing which an ongoing rent abatement of $155.40 shall be awarded until the issue is resolved.

G. Non-functional Oven

81. The Tenants testified that due to the issue of inadequate heat at the rental unit and their extensive use of the oven to maintain heat, they required a frequent replacement of the oven at the rental unit. On some occasions, the Tenants went without an over for several days until it was replaced by the Landlords.

82. The Tenants presented text messages of correspondence between them and the Landlords about this issue. On January 18, 2020, the Tenants texted the Landlords that the oven stopped working – the Landlords responded right away and replaced the unit in 24 hours.

83. The next time the Tenants texted the Landlords about this issue was on February 4, 2020 that the oven was not working – the stove was replaced on March 1, 2020. The next time the Tenants advised the Landlords of the issue with the over was in December 2020 and a new one was replaced by February 2021.

84. As a result of the delays in February 2020 and December 2020, the Tenants incurred out of pocket expenses for feeding their family of 7 by ordering out or cooking at their mom's place. The Tenants seek a 15% rent abatement for the 3 months and 1 week they had to wait for a new unit or $767.81.

85. On cross-examination, the Tenants confirmed that on March 1, 2020, they received a message from the Landlords to drop of the new stove unit but that they were at hockey practice and asked the Landlords not to drop it off- contributing to the delay in receiving the new unit.

86. The Landlords denies receiving notice in December 2020 about the malfunctioning oven but confirms that the Tenants advised him of the issue in January and February 2020.

87. The Landlords further submits that each time the Tenants brought the issue to his attention, he promptly repaired the issue and if he couldn't, he made arrangements for its replacement.

88. On cross-examination, the Landlords recalls sending someone to the rental unit to address the issue with the oven in December 2020 and fixing it in February 2021.

89. Based on the evidence before the Board, I find that the stove was in a state of disrepair for the following periods: February 4 2020 – March 1, 2020 and December 2020 to February 2021.

90. It is unclear why it took the Landlords almost a month to replace the stove in February 2020 and then a month or so in December 2020. Therefore, I find that the Landlords failed

to act in a timely and effective manner to address the issue of the malfunctioning oven at the rental unit for that period.

91. With respect to the remedy sought by the Tenants, given my knowledge and experience in other similar matters, I find it appropriate to grant the Tenants a 5% rent abatement for this

issue for the period requested, or $251.23. I say this because for all three replacements, it appears that the stove was functional and that only the oven was not.

92. This order contains all of the reasons for the decision within it. No further reasons shall be issued.

It is ordered that:

1. The arrears and costs owing to March 31, 2021, total $563.00.
2. The Landlords shall pay to the Tenants a rent abatement of $3,930.65. This amount represents the rent abatement of $4,493.65 less the $563.00 the Tenants owe to the Landlords in rent arrears.
3. If the Landlords do not pay the Tenants the full amount owing on or before May 1, 2023, the Landlords will start to owe interest. This will be simple interest calculated from May 2, 2023 at 6.00% annually on the balance outstanding.
4. The Tenants have the right, at any time, to collect the full amount owing or any balance outstanding under this order.
5. On or before May 20, 2023, the Landlords shall ensure the issue of mould at the rental unit has been rectified.
6. If the Landlords fail to comply with paragraph 5 of this order, the Tenants may deduct a rent abatement of $155.40 each month, starting June 2023, until the issue of mould has been rectified at the rental unit.

April 20, 2023
Date Issued

_____
Sonia Anwar-Ali
Member, Landlords 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.

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