Order under Section 69
Residential Tenancies Act, 2006

Citation: Van Dyk v Shaw, 2022 ONLTB 11992
Date: 2022-12-01
File Number: LTB-L-016964-22

In the matter of: 3, 2551 Sixth Line
Oakville Ontario L6H0H7

Between: Jacques Van Dyk — Landlord

And

Pamela Victoria Shaw — Tenant

Jacques Van Dyk ('JVD' or the 'Landlord') applied (L2 application) for an order to terminate the tenancy and evict Pamela Victoria Shaw ('PVS' or the 'Tenant') because:

- the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant (1st claim in N5 notice of termination-section 64 of the *Residential Tenancies Act, 2006* or the "Act");
- the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex has wilfully or negligently caused damage to the premises (2nd claim in N5 notice-section 62 of the Act);
- the Landlord has entered into an agreement of purchase and sale of the rental unit and the purchaser in good faith requires possession of the rental unit for the purpose of residential occupation (N12 notice of termination-section 49 of the Act).

The Landlord also claimed compensation for each day the Tenant remained in the unit after the termination date.

This application was heard by videoconference on June 13, 2022.

The Landlord, the Landlord's Legal Representative, Michael Tadros ('LLR'), and the Tenant attended the hearing. The Tenant consulted with Tenant Duty Counsel prior to the commencement of the hearing.

Determinations:

1. The L2 application was filed with the LTB on November 4, 2021 and has two bases for the Landlord's claims: an N5 notice that was served by mail with an October 15, 2021 termination date; and an N12 notice that was served on October 31, 2021 with a termination date of December 31, 2021. The N5 notice claims substantial interference with reasonable enjoyment and wilful or negligent damage caused by the Tenant to the rental unit in the amount of $1,286.86. The N12 notice claims that a purchaser of the rental unit requires possession of the rental unit for residential occupation.

2. During the hearing, the parties led the following exhibits into evidence:

   For the Landlord:

   - LL#1:- copies of June 28/21 emails from PVS to JDV, and from condo mgt to JDV re overflow in washroom;
   - LL#2:- copy of December 10/21 letter from LLR to PVS re 1-month comp, claimed damage, etc.

   For the Tenant:

   - TT#1:- copy of June 20/19 email from PVS to JDV re upstairs bathroom slow draining;
   - TT#2:- copy of Aug 4/21 email from PVS to JDV re thanks for covering damage;
   - TT#3:- copies of Nov 1,15,16/21 text messages between PVS and PVS' realtor (R. McKichen) re comp + cash for keys + "no back charge";
   - TT#4:- copies of Dec 6-10/21 text messages between PVS and JDV's realtor (C. Ahearn) re move-out date, terms -cash for keys- and request for N11 to be signed;
   - TT#5:- copies of Dec 10-14/21 emails between PVS and LLR re disagreeing on terms for early termination/move-out;
   - TT#6:- scanned copy of Tenant's insurance policy -term from May 25/21 to May 25/22;
   - TT#7:- copy of July 29/21 email from JDV to PVS agreeing that JDV would pay damage amount; and
   - TT#8:- photos taken by Tenant re how bathroom sink slow-to-drain and copy of Landlord's claimed bill of $1,281.86.

3. Before me, the parties were able to agree upon the following statements of fact:

   a) The Landlord paid the one-month compensation in respect of the N12 notice by waiving the monthly rent ($1,900.00) for November 2021; and
   b) The Tenant gave vacant possession of the rental unit back to the Landlord on December 7, 2021.

4. I find, therefore, that the tenancy between the Landlord and Tenant terminated effectively on December 7, 2021.

5. As a result of the Tenant having moved out, LLR submitted that the L2 application can be effectively narrowed to deal only with the wilful/negligent damage claim under the N5 notice (which falls under section 62 of the Act). After receiving the Tenant's reply, I was satisfied that the L2 application could be narrowed down to just the section 62 claim, as this presented no real prejudice to either party.

6. The presentation of the respective parties' positions on the claim of damage was clearly divergent on who should pay for the repairs. The evidence provided at the hearing showed the actual invoice being claimed was for $1,281.86 (LL#2, TT#7), and not $1,286.86 as claimed in the N5 notice. This discrepancy of $5.00 was not disputed by the Landlord who indicated he would agree to claiming to the lower dollar amount.

7. At the end of the hearing, I directed both parties orally to submit any supplementary evidence in respect of their discussions, agreements or disagreements about the essential question relating to who would ultimately be responsible for the monetary damage amount. I did this because the parties indicated that there was evidence missing – i.e. not already led as shown above – that would shed clearer light on that question.

8. The Landlord's position was that there had been an "offer on the table" in and around July and August 2021 to forgive the damage amount, but that offer was rescinded on August 7, 2021 when the Tenant failed to meet their agreement at that time. The Tenant's position was that the "offer on the table" was never rescinded and further supported by the Landlord's realtor (Chris Ahearn) and her realtor (R. McKichen).

9. I gave the Landlord two deadlines to submit post-hearing, the first deadline being for evidence to show their position – i.e. that the "offer on the table" was rescinded -- to be true. I then gave the Tenant a deadline to submit any rebuttal evidence to the Landlord's post-hearing submission. Finally, I gave the Landlord a second deadline to submit redirect evidence.

10. I confirm that on June 23, 2022, I received a series of documents from the Tenant, along with written arguments, but that none of that series of documents provided anything more – in terms of relevancy – than that which she had led during the hearing. Some of the documents the Tenant provided related to other testimony the Tenant had provided during the hearing about some parking area damage but this was not at all relevant to the L2 application. I also confirm that LLR provided submissions on June 27, 2022, which responded in an email to the Tenant's submissions, but no documented evidence was appended.

11. As explained below, the Landlord has proven on a balance of probabilities that the Tenant caused the negligent or wilful damage as claimed in the N5 notice. However, the Landlord has <u>not</u> proven on a balance of probabilities the grounds for claiming the monetary reimbursement for those damages.

Wilful or negligent damage claim

12. The Landlord's evidence showed that the Tenant advised him by email of a water leak from the bathroom sink on June 28, 2021 (LL#1). In her email, the Tenant indicated that the "*minor overflow in the washroom*" was cleaned up by her but that the leak "*apparently leaked into the neighbours unit below*". The Landlord then referred to the condo management notification to the Landlord when they wrote they were aware of the leak and placed the Landlord on notice about being charged for any repairs needed in unit 1, which was the unit below the rental unit that was damaged (LL#1).

13. This was not contested by the Tenant, as she testified she was in the rental unit at the time of the water overflow. However, she denied the damage claim of undue (negligent) damage by stating that she had initially alerted the Landlord about a year earlier about a slow-draining bathroom sink (TT#1). She also proffered photos (undated) of the sink to evidence its slowness in draining (TT#8). The Tenant stated that the Landlord never attended to her June 2019 email; he did not snake the drain or take any other action.

14. The Landlord's position was that water drains typically drain at different rates, and the fact that nothing happened for a year shows that there was nothing wrong with the rental unit bathroom sink drain. In effect, the Landlord asserted that the Tenant was simply forgetful or negligent when she left the bathroom sink running for a long time without turning it off.

15. Based on the respective submissions, I was persuaded more by the Landlord than by the Tenant on this claim. Indeed, the Tenant did not show that any blockage or real malfunction of the bathroom sink drain had occurred in the past. The one email in June 2021 to indicate the drain was draining slowly was not an indication of any sort of malfunction that would necessitate repair action, or would cause an overflow. That the bathroom sink drained slowly, in my view simply put, does not indicate there was something wrong with the drain. It was more evident to me that the water overflow on June 23, 2021 was due to the Tenant forgetting to turn off the faucet. As a result, I find this inadvertent undue damage, that was caused to unit 1 below the rental unit, falls into the category of "negligent" damage.

Requested Remedy for Undue Damage

16. Turning to the requested remedy under the L2 application – i.e. claiming the Tenant is to pay the Landlord the $1,281.86 repair bill that was invoiced to the Landlord by condo management -- I came to a different conclusion based on the parties' submissions.

17. During the hearing, the Tenant led persuasive evidence to show that the Landlord agreed to assume the cost of repair himself. The TT#7 email clearly shows the Landlord had agreed to pay for the damage without conditions – i.e. there was nothing mentioned in that email to tie the Landlord's agreement to a timeframe or some other performance requirement (such as the Tenant moving out). He simply said the following: "*Although not at fault, I will pay the $1,200 for the water damage in unit 1*". (The Landlord did say in the next sentence that if any damage had occurred in the rental unit itself, then that was not part of the agreement.)

18. The Tenant also referred to two other text message threads to support her position.

19. The first thread was TT#4, which shows that the Landlord's realtor (Chris Ahearn), who was acting on the Landlord, corresponded with the Tenant about the final terms for her moving out, which included the signing of an N11, the Landlord waiving November 2021 rent and the Landlord paying an additional incentive of $1,900.00. These final terms of rent waiving and $1,900.00 to be paid were clearly contingent on the Tenant signing the N11. I note that nothing in TT#4 mentions the Tenant must pay the water damage bill.

20. The second thread was TT#3, which shows an exchange between the Tenant and the Tenant's realtor (Rob McKichen – shown as "Rob Michels Agent" in the thread). In that thread, the Tenant's realtor informs the Tenant of what he believes the negotiations between parties looked like in that November 2022 timeframe. In response to the Tenant's question whether the Landlord would waive November 2021 and pay her an additional one-month rent incentive, her realtor said: "*Yes. He needs something in writing so he has assurance you are leaving but yes we have verbal agreement. Well the deal was for free rent for November and no back charge. Then they were going to stretch it maybe for a couple of days. Which they didn't want to do. So I don't know what to say.*"

21. The Tenant confirmed in her testimony that the matter of the Landlord picking up the cost of repair for the water damage that happened on June 23, 2021 never went away or was rescinded by anyone.
22. The Landlord's testimony/submission is that pursuant to an earlier purchase agreement in the summer of 2021 that failed to close because the Tenant did not move out, the Landlord had offered to pay for the water damage if the Tenant moved out by whatever specified date they had agreed upon. The Landlord submitted that there had been a previous N12 notice (with an October 31, 2021 termination date) that was supposed to be the relevant termination notice at that time. However, when the Tenant failed to honour the terms of that agreement, and on or about August 7, 2021, the Landlord claimed he rescinded the agreement to pay for the water damage himself.
23. The Landlord provided no evidence to support his testimony and again provided no supplementary evidence by either of the post-hearing deadlines I provided him.
24. The "he said, she said" testimonies of the parties, which were contrary to one another on the question of the $1,281.86 damage amount, were inconclusive. However, the documents that were submitted into evidence and which are identified above, clearly favour the Tenant. The Tenant's evidence is the better evidence clearly, and on a balance of probabilities, I find the Landlord offered to pay for the damage himself on July 29, 2021 and that this offer to pay was not rescinded at any material time.
25. As the Landlord was successful on the basic claim under section 62 for wilful or negligent damage, I will order the reimbursement of the $201.00 filing fee, but I will order no other payment of money.

It is ordered that:

1. The tenancy between the Landlord and the Tenant was terminated as of December 7, 2021.
2. The Tenant shall pay to the Landlord $201.00 for the cost of filing the L2 application.
3. If the Tenant does not pay the Landlord the full amount of $201.00 owing on or before December 12, 2022, the Tenant will start to owe interest. This will be simple interest calculated from December 13, 2022 at 4.00% annually on the balance outstanding.

December 1, 2022
Date Issued

Alex Brkic
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.