Order under Section 69
Residential Tenancies Act, 2006

Citation: Xin v Fortin, 2022 ONLTB 10577
Date: 2022-11-10
File Number: LTB-L-004178-22

In the matter of: 46 GLENWOOD DR
HUNTSVILLE ON P1H1B6

Between: Wei Xin — Landlord

And

Ann Joyce Fortin, Luc A joseph Fortin — Tenant

Wei Xin (the 'Landlord') applied for an order to terminate the tenancy and evict Ann Joyce Fortin, Luc A joseph Fortin (the 'Tenant') because the Tenant did not pay the rent that the Tenant owes.

The Landlord also applied for an order to terminate the tenancy and evict the Tenants because the Tenants have persistently failed to pay rent when it was due.

This application was heard by videoconference on August 30, 2022 and October 25, 2022. The Landlord, the Landlord's interpreter, Y. Wang, the Tenant, L. Fortin (LF), and the Tenant's support person, M. Ankenmann, attended the hearing.

Preliminary Issues:

Validity of the N8 Notice of Termination

1. The Landlord served the Tenants with an N8 Notice of Termination (the 'N8 Notice') on January 18, 2022 pursuant to section 58 of the *Residential Tenancies Act, 2006* (the 'Act'). The termination date in the notice was February 28, 2022.

2. The Landlord testified that at the time the N8 Notice was served, the tenancy was a weekly tenancy and the Tenants paid rent every Friday. Section 58 of the Act allows the Landlord to give a notice to terminate the tenancy if a tenant has persistently failed to pay the rent on the date it becomes due. The notice has to be given in accordance with section 44.

3. Section 44 of the Act provides that where there is a weekly tenancy, the notice to terminate the tenancy shall be given at least 28 days before the date the termination is specified to be effective and shall be on the last day of the rental period. So while 28 days were properly given, if the rent is due on the Friday, the following Thursday would be the end of the tenancy. February 28, 2022 did not fall on a Thursday and is therefore not the last date of the tenancy. As such, the Landlord cannot terminate the tenancy based on the N8 Notice.

4. The Landlord was asked if she wanted to proceed with the utilities claimed in the application. She confirmed her intent.

Validity of the N4 Notice of Termination

5. On January 3, 2022, the Landlord served the Tenants with an N4 Notice of Termination (the 'N4 Notice') pursuant to section 59 of the Act. The N4 Notice stated that the Tenants were charged $26,400.00 from March to December 2021 and the Tenants paid only $22,100.00 for this period.

6. The Landlords submitted that the rent was $600.00 a week. The Tenants submitted that the rent was $1,700.00 a month. For the reasons that follow, I find that the monthly rent was $1,700.00 a month. Therefore, the N4 Notice is invalid pursuant to subsection 43(2) of the Act.

7. It was agreed that the tenancy commenced in June 2013. The rent was $1,700.00.

8. The Landlord submitted that the rent changed in 2017. Commencing September 2017, the rent increased to $1,750.00 a month. The rent increased again in January of 2020 to $1,800.00 a month until February 2021. From March 2021 to December 2021, the rent changed to $600.00 a week. Submitted into evidence was an email dated December 3, 2019 from the Landlord to LF. It stated, "As we talked from the phone, from January 2020, your rental place (46 glenwood drive, Huntsville), New rental price will be $1800/month and it will be valid until December 2021. All others keep the same as now. Confirm please!" The same day, LF replied, "Agree!"

9. The Tenants' position was that the rent from 2017 to present was $1,700.00. The Landlord never served the Tenants with a notice of rent increase. The Landlord agreed that no Notice of Rent Increase was served. However, all increases were by mutual agreement.

10. Section 116 of the Act states that a landlord 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 landlord's intention to do so. The notice must be in a form approved by the Board and shall set out the landlord's intention to increase the rent and the amount of new rent. As per section 120 of the Act, no landlord may increase the rent charged to a tenant during the term of their tenancy more than the guideline increase.

11. The rent increases by the Landlord were not lawful. There was no notice of rent increase served and the rent increases of $50.00 more a month were above the rent increase guideline (2017 – 1.5%, 2020 – 2.2%, 2021 – 0.00%).

12. The Landlord submits that the rent increases were done by way of agreement. Pursuant to section 121, a landlord and tenant may agree to increase the rent charged to the tenant for a rental unit above the guideline if the landlord has carried out or undertakes to carry out a capital expenditure or the landlord has provided or undertakes to provide a new or additional service in exchange for the rent increase. The agreement shall be in a form approved by the

Board and shall set out the new rent and the tenant's rent to cancel the agreement and the date the agreement was to take effect.

13. There was no evidence before me that the Landlord undertook capital expenditures or was providing an additional service. Furthermore, the email of December 3, 2019 does not meet the requirements of section 121.

14. I also considered section 135.1 of the Act which specifies that an increase of rent that otherwise be void is deemed not to be void if the tenant has paid the increased rent in respect of each rental period for at least 12 consecutive months. In this case, I do not find the Tenants had.

15. While the Tenants agreed that they would pay $1,800.00 a month commencing January 2020, an examination of the ledger completed by the Landlord and the Tenants establishes that they did not pay this amount per month. The Landlord's own evidence was that the Tenants were in arrears for the entire period of January 2020 to February 2021. As such, I find that the increase is not deemed to be void as the Tenants did not pay the increased rent for 12 consecutive months.

16. The same can be said of the $600.00 a week rent increase in March 2021. The Tenants did not pay this amount for 12 consecutive months as it was uncontested that the Tenants stopped paying rent after November 2021.

17. In consideration of the foregoing, I find that the N4 Notice is invalid as it fails to include the correct amount of rent charged from March 2021 to December 2021. The rent charged should have been $17,000.00 (based on the rent of $1,700.00 a month) as the rent increases were void.

18. The Landlord was asked if she wanted to proceed with a claim for arrears in the application. She confirmed her intent.

Determinations:

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

20. The lawful rent is $1,700.00. It is due on the 1st day of each month.

21. Based on the Monthly rent, the daily rent/compensation is $55.89. This amount is calculated as follows: $1,700.00 x 12, divided by 365 days.

22. The Tenants have not made any payments since the application was filed.

23. The Landlord's position is that the rent arrears owing to October 31, 2022 is $27,500.00 based on $600.00 a week rent. The Tenants disputed that they were owing any arrears, and in fact, the Landlord was owing $13,172.22 to the Tenants.

24. Regarding utilities, the Landlord testified that the Tenants were owing $1,045.79 in utilities from March – November 15, 2021. The Tenants submitted that that no utilities were outstanding.

25. The parties agree that the Tenants are responsible for all utilities since the commencement of the tenancy. The Landlord paid the utilities on behalf of the Tenants, and it was agreed the Tenants would pay the Landlord $100.00 and pay the difference of any additional charges. The Landlord also testified that the Tenants were responsible for the hot water tank fee. The Tenants did not dispute this fact. The Landlord's records show that the Tenants were charged the hot water tank fee from July 2015 to May 2017.

26. On a balance of probabilities, I find that the Tenants are owing $6,969.71 for arrears and utilities to the date of this order. As per my determination above, the lawful monthly rent for the period of arrears is $1,700.00.

27. I consider the Landlord's documentary evidence and the Tenants' documentary evidence. For the period of 2015 – 2016, I accept the Landlord's evidence regarding rent and utilities charged as she had a detailed whereas the Tenants did not. I note that the Landlord's ledger was prefaced with the Tenants being in arrears of $3,385.56 for June 2013 to June 2015. The Landlord did not have sufficient evidence regarding this period and therefore it was not considered. For the period of 2017 to present, I prefer the Tenants' evidence about the amount paid, which included bank records of payments made to the Landlord.

28. The following chart is my finding of fact regarding rent, hot water tank and utilities to November 2022:

Year	Rent Charged	Hot Water Tank	Utilities	Tenant Paid	BALANCE
2015	10,200	175.74	1,060.83	8,825.00	2,611.57
2016	20,400	351.48	2,180.83	25,220.00	- 2,287.69
2017	20,400	146.45	1,776.74	22,518.00	- 194.81
2018	20,400		1,415.50	24,340.88	- 2,525.48
2019	20,400		1,377.75	21,431.33	346.42
2020	20,400		1,375.92	24,309.00	-2,533.08
2021	20,400		1,045.79	28,853.01	- 7,137.22
2022	18,700			0.00	18,700.00
TOTAL					$6,979.71

29. The Landlord incurred costs of $186.00 for filing the application and is entitled to reimbursement of those costs.

SECTION 82 CONSIDERATIONS

30. The Tenants raised a number of issues pursuant to section 82 of the Act. However, only the following issues were considered due to the limitation of subsection 29(2) of the Act:
    - Furnace Filter
    - Duct Cleaning

- Tree Removal

31. LF testified that on October 6, 2022, he changed the furnace filter. On March 29, 2022, he got the ducts cleaned as his wife had terrible asthma and concluded that the ducts needed to be cleaned to address the issue. In or about April or May 2022, he spent two hours removing the trees which had fallen down.

32. When asked whether he informed the Landlord of any of these issues before he undertook to fix it, LF stated that he did not. This is because in the past, the Landlord denied it was her obligation to address the Tenants' maintenance issues, as set out in the tenancy agreement.

33. The Landlord testified that the on December 7, 2021, she had the furnace filter replaced and the furnace cleaned. Further, the Landlord should not be responsible for duct cleaning as the Tenant's asthma was not raised as an issue before, and the Tenants have lots of pets, which could be the cause of her health issues. Finally, with respect to the tree, the Landlord was not informed of the issue and would have responded appropriately if informed.

34. On a balance of probabilities, I find that the Landlord was not in breach of her maintenance obligations.

35. In *Onyskiw v. CJM Property Management Ltd.*,[1] the Court of Appeal for Ontario rejected the position that a landlord is automatically in breach of its obligation to maintain and repair under subsection 20(1) as soon as an interruption in service occurs or the unit is in need of repair. The Court found that the reasonableness of a landlord's response and conduct to the maintenance issue(s) is a factor in deciding whether a breach occurred and/or a remedy. This is consistent with the Board's Interpretation Guideline 5.

36. The uncontested evidence was that the Tenants informed the Landlord of the issues before they undertook to fix it. It is unclear how the Landlord could provide a reasonable response to the Tenants' maintenance issues if the Landlord was not aware an issue existed. Therefore, the Tenants' claims pursuant to section 82 are dismissed.

37. While the Tenants claims about lawn maintenance and snow removal were not considered as they were not plead in accordance with subsection 29(2) of the Act, I find it important to note that the Landlord is responsible for exterior maintenance. While the Landlord submits that she is not as per their lease agreement, any term in a tenancy agreement is deemed void if it is contrary to the Act (see section 4 of the Act). Having the Tenants responsible for lawn maintenance and snow removal directly conflicts with section 20(1) of the Act.

38. This order contains all of the reasons within it. No further reasons shall be issued.

[1] 2016 ONCA 477 [*Onyskiw*].

It is ordered that:

1. The Tenants shall pay to the Landlord $6,979.71, which represents the amount of rent owing and compensation up to November 10, 2022.

2. The Tenants shall also pay to the Landlord $186.00 for the cost of filing the application.

3. If the Tenants do not pay the Landlord the full amount owing on or before November 30, 2022, the Tenants will start to owe interest. This will be simple interest calculated from December 1, 2022 at 3.00% annually on the balance outstanding.

November 10, 2022
Date Issued

Camille Tancioco
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.