



Order under Section 31 & 9(2) Residential Tenancies Act, 2006

Citation: VICCKIES v ZHANG, 2024 ONLTB 15009

Date: 2024-03-08

File Number: LTB-T-051300-22

LTB-L-009475-24

In the matter of: BASEMENT ROOM, 76 BICKERTON CRESCENT
TORONTO ONTARIO M2J3T1

Between: ANNETTA VICCKIES

And

EMILY ZHANG
PETER DEBUDA

I hereby certify this is a
true copy of an Order dated

Mar 08, 2024

Landlord and Tenant Board

Tenant

Landlords

ANNETTA VICCKIES (the 'Tenant') applied for an order determining that EMILY ZHANG ('EZ') and PETER DEBUDA('PD') (the 'Landlords'):

- entered the rental unit illegally.
- altered the locking system on a door giving entry to the rental unit or residential complex without giving the Tenant replacement keys.
- substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenant or by a member of their household.
- harassed, obstructed, coerced, threatened or interfered with the Tenant.

This application was heard by videoconference on February 14, 2024.

The Landlords and Landlord's legal representative L. Duchene and Landlords' witnesses D. Powers ('DP'), M. Cao ('MC') and the Tenant and Tenant's Legal Representative J. Myers attended the hearing.

Background:

1. As a preliminary matter the Landlords alleged that Tenant was required to share a kitchen facility with the Landlords and her family, who is the owner of the accommodation, and that the Landlords lived in the house in which the Tenant's unit is located. The Landlords claimed that subsection 5(i) of *the Residential Tenancies Act, 2006* (the 'Act') operated to exclude the Tenant's unit from the application of the Act.
2. The Landlord's legal representative stated that an A1 application has been filed with the Board for an order to determine whether the Act applies, and a hearing has not been scheduled yet. The file number is LTB-L 009475-24. Additionally, the Landlords also filed a

request to combine it with the Tenant's T2 application to be heard together, and the request is currently pending.

3. After consideration, I found it appropriate for those applications to be heard by me together given the circumstances. The Tenant's Legal Representative has no objection to hearing those two applications together at the hearing. In any event, a party can always raise a preliminary issue about whether the Act applies at the start of a hearing without the need for an A1 application. The parties were prepared to make submissions on the issue, and I saw no reason to delay the proceedings for that purpose.

Determinations:

4. As explained below, For the following reasons, I find that the Act does not apply.
5. The exemption set out in the subsection 5(i) of the Act says,

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

6. Is the Tenant required to share a kitchen or bathroom facility with the owner of the living accommodation? I conclude that the answer is yes.
7. The residential complex is a house in which the Tenant lives in the basement unit and the Landlords and their family live on the main floor. There was no separation by way of a locked door that would prevent either party from entering the other area. The Tenant's rental unit has its own built-in bathroom but no kitchen facilities. There is one main kitchen in the basement and another kitchen on the main floor.
8. There was no written lease between the Landlords and the Tenant, the Tenant moved into the rental unit around October 2010 based on verbal agreement between the Tenant and the female Landlord, EZ.

Landlords' Evidence:

9. At the hearing, EZ testified that she has known the Tenant since 2006. EZ and her late husband purchased this house in 2007, and they began using the basement kitchen upon moving in since the main floor kitchen was not fully functional. In October 2010, the Tenant communicated her need for temporary accommodations. EZ, in response, extended an offer for one of the basement units to the Tenant without a written agreement. The basement unit included a built-in bathroom and no kitchen. EZ further testified that she explicitly informed the Tenant that she has option to use the basement kitchen as needed, and the Tenant agreed to this arrangement.

10. DP, a family friend of the Landlords and also their real estate agent, provided testimony during the hearing. DP testified that she assisted Landlord EZ and her late husband in purchasing the house in 2017. Upon moving into the house, the family had already been utilizing the basement kitchen for cooking and dining. Although there was another kitchen on the main floor, the Landlord's family did not commence using it until 2023. DP further testified that she periodically visited the house for dinners with the Landlord's family, during which they used the basement kitchen for cooking and dining. DR testified that, since the Tenant moving into the basement unit, she never observed the Tenant using the basement kitchen.

Tenant's Evidence:

11. The Tenant testified that she occupied the rental unit in October 2010, and there was no written agreement between her and EZ. She was informed by EZ that she had the option to use the basement kitchen; however, she infrequently utilized it as she typically dined outside after work. The Tenant testified that in 2010, she was the sole occupant of the basement. She never witnessed EZ or any family members using the basement kitchen, and her infrequent visits to the main floor prevented her from confirming whether the family used the main floor kitchen. Furthermore, the Tenant testified that the Landlord's family began using the basement kitchen after 2015, at the same time, EZ's two sons who also moved into the basement.

Analysis:

12. In my view, the phrase "required to share" contained in section 5. i) of the Act lends itself to two possible interpretations. The first interpretation is that an occupant and an owner of a living accommodation may be required to share a kitchen or bathroom because of the available amenities or physical layout of the premises. The second possible interpretation is that an occupant and an owner of a living accommodation may be required to share a kitchen or bathroom because they have agreed to do so. This latter interpretation was adopted by Ontario District Court Judge Clarke 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. Judge Clarke determined that the fact that 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."

13. Based on the evidence presented, I am satisfied that there was a verbal agreement between EZ and the Tenant regarding the Tenant's obligation to share the kitchen facility. Testimonies from both EZ and the Tenant affirmed that the Tenant 'has the option' to use the basement kitchen. I conclude that this leans towards the Landlords granting permission to the Tenant to use the basement kitchen. And the Tenant would not have exclusive possession of the basement kitchen, even the Landlords can access to another kitchen on the main floor.
14. In *Cowie v. Bindlish*, 2010 ONSC 2628 (CanLII), the Courts set out that the Board must have regard to the living circumstances at the commencement of the tenancy, and neither party can unilaterally change the terms of the tenancy. The Tenant's Legal Representative also submitted the case *McKnight v. Kirk*, 2022 ONSC 3617 and asked the Board to consider. In *McKnight v. Kirk*, 2022 ONSC 3617, Courts also set out the Board has regard to the living arrangements at the beginning of the tenancy and any unilateral change to the pattern of use by the Landlords after the tenancy begins will not cause a tenancy that is subject to the Act to be exempted by s. 5(i).
15. Therefore, the next question before me is the living circumstances at the initiation of the tenancy. Both EZ and DP testified that the Landlords and the Landlords' family consistently used the basement kitchen from 2007 until 2023. Conversely, the Tenant attested that the Landlord's family did not utilize the basement kitchen when she initially moved into the rental unit. However, she also acknowledged infrequent engagement in cooking and dining since her move-in. In consideration of these details, I find that the Landlords and the Landlord's witnesses provided credible and consistent testimony during the hearing. In addition, and as with any exemption, the burden of proof rests on the person seeking to rely on the exemption. In this case, that is the Landlords.
16. As the relationship between the parties is exempt from the Act, the Board has no jurisdiction to hear the Tenant's application and it must be dismissed.

It is ordered that:

1. The Act does not apply.
2. The Tenant's T2 application is dismissed as the Board lacks jurisdiction.

March 8, 2024
Date Issued



Joy Xiao
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.