

Residential Tenancies Tribunal

Application 2023-0891-NL

Decision 23-0891-00

Seren Cahill
Adjudicator

Introduction

1. Hearing was called at 1:49 pm on 31-October-2023.
2. The applicant, [REDACTED], hereinafter referred to as the tenant, attended by teleconference. He was assisted in providing his evidence by his mother, [REDACTED], also present via teleconference. An authorized representative form was submitted.
3. The respondents, [REDACTED] and [REDACTED], hereinafter referred to as "the landlords" also attended via teleconference.

Preliminary Matters

4. It emerged at the hearing that the tenant no longer resides at the rental premises. Normally, where the tenant has left the premises, the validity of a termination notice is no longer in issue. However, the tenant testifies that he was effectively moved out against his will. This tribunal must determine if it has the power to rectify this and, if so, whether it should exercise that power in this case.

Issues before the Tribunal

5. Issue 1: Was the termination notice valid?
6. Issue 2: If the tenant was removed improperly, is any remedy available?
7. Issue 3: Was the tenant removed improperly?

Legislation and Policy

8. The jurisdiction of the Director of Residential Tenancies is outlined in sections 46 and 47 of the *RTA 2018*.

9. Also relevant and considered in this decision are sections 24 and 34 of the *Residential Tenancies Act 2018 (RTA 2018)*:

24. (1) Notwithstanding subsection 18(2) and paragraph 18(3)(b), where a tenant contravenes statutory condition 7(a) set out in subsection 10(1), the landlord may give the tenant notice that the rental agreement is terminated and the tenant is required to vacate the residential premises on a specified date not less than 5 days after the notice has been served.

(2) In addition to the requirements under section 34, a notice under this section shall

- (a) be signed by the landlord;
- (b) state the date on which the rental agreement terminates and the tenant is required to vacate the residential premises; and
- (c) be served in accordance with section 35.

Statutory condition 7 reads:

7. Peaceful Enjoyment and Reasonable Privacy -

- (a) The tenant shall not unreasonably interfere with the rights and reasonable privacy of a landlord or other tenants in the residential premises, a common area or the property of which they form a part.
- (b) The landlord shall not unreasonably interfere with the tenant's reasonable privacy and peaceful enjoyment of the residential premises, a common area or the property of which they form a part.

34. A notice under this Act shall

- (a) be in writing in the form prescribed by the minister;
- (b) contain the name and address of the recipient;
- (c) identify the residential premises for which the notice is given; and
- (d) state the section of this Act under which the notice is given.

Evidence Review

10. A significant amount of evidence was provided at the hearing, parts of which seem to contradict each other. What follows is a brief review of the relevant evidence, organized into an approximate timeline.

11. There was a written rental agreement (T#1) provided. It begins on 01-June-2023 and is a fixed term lease ending on 31-May-2024. It regards an apartment in an apartment building. It set rent at \$1600 to be paid on the 1st of each month, and notes that a security deposit of \$800 was paid on 06-April-2023.

12. The landlord testified that on the night of 18-June-2023 they received a message from another tenant alleging that [REDACTED] was smoking. They sent the tenant a message asking if he was smoking, and a text conversation (LL#1 and LL#2) ensued.
13. On 19-June-2023 the landlord was told by a neighbour through email (LL#5) that the tenant was removed from the apartment by police. This neighbour also briefly mentioned the issue of smoking but added that it was difficult to tell from where the smoke originated. Their primary concern seemed to be the presence of police and the implication that, if the tenant was removed by police, he could be a danger to others. For instance, the last line of the email is “the security of our neighbourhood is everyone’s responsibility.” Concerned, the landlord contacted the tenant’s mother, who was listed as his emergency contact.
14. The tenant suffered from an episode of mental illness and, as a result, was hospitalized on 20-June-2023. The tenant estimates that he was discharged in the middle of July, at which point he returned to the premises.
15. The tenant acknowledged he had been smoking in the apartment prior to this hospitalization but added that he had quit smoking while hospitalized and did not resume smoking.
16. On 30-August-2023 the landlord received allegations over the phone that the tenant was smoking.
17. The tenant’s mother had a conversation with the landlord on 31-August-2023 over the phone in which she was advised that there would be a termination notice issued to the tenant regarding his alleged smoking. A comment was made by the landlord at this time to the effect that they knew the tenant had a physical disability but did not know he had a mental disability. The tenant’s mother alleged that the landlord followed this up by remarking that they would not have rented to him had they known about his mental disability. The landlord denies this.
18. At about 10 pm on 31-August-2023 the landlord received an email (LL#5) from the two tenants in the apartments directly above the tenant’s. They express concern over a strong smell of smoke within their apartments and that they believed it was coming from the tenant’s room.
19. On the morning of 01-September-2023 a termination notice (T#2) was issued by email to the tenant at the email address provided on the rental agreement, and his mother was CC’d. This termination notice is signed by the Landlord, dated the day it was sent, specifies that it is a notice under s. 24 of the *RTA 2018*, lists the premises it regards, and is in the form prescribed by the minister. It gives the move out date as 16-September-2023.
20. Also on 01-September-2023, the tenant was hospitalized again for due to another (or continuing) mental health episode. The tenant did not have a phone during his second hospitalization and was not able to communicate with the landlord or his mother.
21. Also on 01-September-2023, the tenant’s mother entered his apartment. She testified that at this time there was no evidence of smoking in the apartment.

22. On 08-September-2023 the tenant's mother met with the landlord's daughter at the tenant's apartment. She testified that the daughter acknowledged that there was no evidence of smoking or other issues with the apartment. She also testified that outside the apartment she could smell marijuana. At this time the tenant's mother, believing she was acting in her son's best interest but without any instruction from him, removed some of his possessions from the apartment, intending to move him out. Larger items were left as she would need assistance removing them.
23. On 16-September-2023 the landlord received an email from the tenant's mother (LL#3). In this email the tenant's mother said "I was late after noon on Thursday that [the tenant] permitted me to enter his apartment to remove his belongings."
24. The tenant's mother could not get the tenant's furniture out of the apartment in the timeframe given by the landlord. They struck a deal that the furniture would go to an acquaintance of the landlord's and in exchange the landlord would return the tenant's security deposit. At the time of the hearing the security deposit has been sent electronically to the tenant, who has not yet chosen to accept it.
25. Sometime during mid-to-late September the tenant was discharged, and it was at this time he found out that he had been moved out from the apartment and the locks were changed.
26. The landlord submitted pictures (LL#4) of the vacant apartment from after the tenant had moved out.

Issue 1: Validity of the Termination notice

Tenant's Position

27. The tenant maintains that the notice was invalid as he was not smoking for some time before it was issued. The tenant's mother suggested that he was being targeted due to his mental illness.

Landlord's Position

28. The landlord maintained that the termination notice was given because the tenant interfered with the right to peaceful enjoyment of other tenants and neighbours by smoking in his apartment.

Analysis

29. The termination notice (T#2) complies with all requirements of form, content, and service. It can therefore only be invalid if the tenant did not interfere with the right to peaceful enjoyment and reasonable privacy of other tenants or landlords.
30. A single instance of smoking would not rise to the standard of interference with peaceful enjoyment. I must therefore consider the evidence regarding whether or not the tenant was smoking in the apartment in the time between his first and second hospitalizations.

31. The tenant's mother testified that during the walkthrough, there was no sign of anyone smoking in the apartment. Cigarette smoke is widely known to have a powerful scent that often lingers, especially in fabrics, so one may expect a lingering smell at this stage, only a week or so after the tenant had been removed.
32. In LL#4, there was also no evidence of any of the yellow or brown stains that can appear on walls and ceilings where there is regular smoking. This corroborates the mother's claim.
33. The tenant testified that he stopped smoking before the period in question. According to his testimony, the initial period of withdrawal would have been spent at the hospital. He also testified that he had not smoked after he returned. Special note must be made of the tenant's mental state during this period. He appeared to have difficulty accurately recalling the events in question. It became apparent during the hearing that the tenant was unable to fully appreciate the extent to which his behaviour was affected by his mental illness. This has no effect on his credibility, or willingness to tell the truth, but it does suggest that his reliability, or ability to accurately recall events, is impaired to some extent.
34. The landlord's evidence that the tenant had been smoking during the period between hospitalizations is limited to their own testimony and LL#5. The landlord admitted that all of their knowledge about the apartment is secondhand, through correspondence with others. LL#5 is an example of such correspondence.
35. LL#5 is also an example of hearsay, that is, the words of another person tendered as evidence of their contents. Hearsay evidence is generally inadmissible in Canadian courts. However, section 46(2)(c) of the *RTA 2018* says:

46. (2) The director may

...

(c) receive or accept evidence and information on oath, affirmation, affidavit or otherwise, whether or not that evidence or information is admissible as evidence in a court.

36. There are several issues with the acceptance of hearsay as evidence. First, the second party is not sworn or under oath to tell the truth. Should they wish to lie, they may do so without the risk of being charged for perjury. Additionally, no questions may be asked of this party. There is no opportunity to put to them contradictory evidence, or ask them to explain their reasoning, or otherwise raise any issues of reliability or credibility. 46(2)(c), above, allows this tribunal to accept the evidence notwithstanding these weaknesses. I choose to do so. However, I will consider the weaknesses of this type of evidence in deciding the weight it is afforded.
37. LL#5 is an email from two tenants who reside above the tenant. The author asserts in the singular that on August 31, 2023, they found a strong smell of smoke in their respective apartments. Notably, this is the day before the tenant's second hospitalization. They do not explain how they know where the smoke is coming from, but the landlord testified that there is a vent above the tenant's apartment leading to theirs. They also make mention of a neighbour who is also bothered by the smoke, who is

particularly concerned as her son is asthmatic. The representations regarding the statements of this neighbour are double hearsay, and so I afford it very little weight.

38. Considering the evidence as a whole on a balance of probabilities, I find that the tenant did not interfere with the right to peaceful enjoyment and reasonable privacy of other tenants or landlords.

Issue 2: If the tenant was removed improperly, is any remedy available?

Tenant's Position

39. The tenant believes he should be allowed back in the apartment. He adds that it is a difficult market to find any apartment, especially one that suits his needs regarding his physical disability (e.g., being all on one level). He says that he is effectively homeless and has been since he left the hospital the second time.

Landlord's Position

40. The landlord submits that the tenancy is over, and the unit is vacant, and that the tenant will not be allowed to return. They add that they believed they followed all the proper steps and procedures.

Analysis

41. Section 47 of the *RTA 2018* reads as follows:

47. (1) After hearing an application the director may make an order

- (a) determining the rights and obligations of a landlord and tenant;
- (b) directing the payment or repayment of money from a landlord to a tenant or from a tenant to a landlord;
- (c) requiring a landlord or tenant who has contravened an obligation of a rental agreement to comply with or perform the obligation;
- (d) requiring a landlord to compensate a tenant or a tenant to compensate a landlord for loss suffered or expense incurred as a result of a contravention of this Act or the rental agreement;
- (e) directing a tenant to vacate the residential premises on a specified date;
- (f) directing a landlord to deliver to a tenant possession of personal property taken in contravention of this Act or the rental agreement or to compensate a tenant for the value of the personal property taken;
- (g) directing a tenant to deliver to a landlord possession of personal property taken in contravention of this Act or the rental agreement or to compensate a landlord for the value of the personal property taken;
- (h) directing a landlord to pay to a tenant an amount as compensation for inconvenience as a result of a contravention of this Act or the rental agreement, and authorizing the tenant to offset that amount against future rent;

- (i) authorizing a tenant to offset, in the manner specified in the order, money a landlord owes to the tenant against money the tenant owes to the landlord;
- (j) authorizing a landlord to offset, in the manner specified in the order, money a tenant owes to the landlord against money the landlord owes to the tenant, other than a security deposit where the landlord has not made an application under subsection 14(10);
- (k) directing a tenant to pay rent or a specified amount of rent to the director;
- (l) determining the validity of a notice to terminate a rental agreement;
- (m) determining the disposition of a security deposit;
- (n) extending the notice period under subsection 18(4);
- (o) extending or reducing the notice period under subsection 28(9);
- (p) imposing terms and conditions the director considers appropriate, including terms and conditions to ensure compliance with this Act and the rental agreement; and
- (q) requiring an unsuccessful party to an application to pay costs to a successful party to an application.

(2) Where

- (a) a party named in an order issued under subsection (1) was served with the order; and
- (b) that party has not complied with the order
 - (i) by the date specified in the order, or
 - (ii) within a reasonable time where there is no date specified in the order,

the director may issue a certified order at the request of a party named in the order.

(3) An order certified under subsection (2) may be enforced as, or in the same manner as, a judgment of the Supreme Court of Newfoundland and Labrador.

(4) Where an order certified under subsection (2) requires the payment of an amount of money that is within the jurisdiction of the Provincial Court under the *Small Claims Act*, that certified order shall be entered and enforced as a judgment or order of the Provincial Court by filing it with that court.

(5) An order under paragraphs (1)(e), (f) and (g) that is certified under subsection (2) shall be sent to the sheriff for enforcement.

(6) The director is not prohibited from conducting a hearing and making an order by reason of having attempted to mediate the matter under section 45.

42. Nothing in s. 46(1) explicitly gives the director the authority to order that a landlord must allow a tenant to return to the residential premises. In considering whether or not this power is included implicitly, we must apply the principles of statutory interpretation. The words of an Act are to be read in their entire context and in their grammatical and

ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature.

43. It could be argued that the power is included by the words of subsection (a), (c), or (p), above. On the other hand, the fact that (e) is explicit that the director may order a tenant to leave suggests that if the House of Assembly had intended for the director to have the opposite power, they would have done so just as explicitly.
44. Considering the rest of the section, we can see that subsections (3) through (5) concern the enforcement of judgments. Notably, subsection (4) provides a procedure only for those orders containing the payment of money. Subsection (5) provides an alternate enforcement route specifically for orders under paragraphs (1)(e), (f), and (g). These three all concern matters which could not be dealt with through the payment of money alone. (1)(e) in particular, the power to order a tenant to leave, is closely analogous to the power to order a landlord to allow a tenant to return. The omission of any enforcement measure for this power is a strong indication that the House of Assembly did not intend for the director to have such a power.
45. Based on the above, I conclude the director does not have the power to order that a tenant be allowed to return to the residential premises. Pursuant to 47(1)(d) and (h) the director does have the authority to require a landlord to compensate a tenant for damages and inconvenience, respectively, but this would require that a new application be made seeking those remedies. The current application did not seek financial compensation, so it cannot be awarded here. The requirement that an application specify the remedies sought is not merely technical. It ensures that the respondent is aware of the potential consequences of the claim and has the opportunity to prepare any evidence they believe is relevant to the issue, a vital aspect of procedural fairness.

Issue 3: Was the tenant removed improperly?

46. In light of the foregoing, this would be a purely academic question that this tribunal was not directly asked to address. I therefore decline to consider it.

Decision

47. The termination notice dated 01-September-2023 is invalid. This tribunal has no power under the law to require a landlord to allow a tenant to return to a premises from which they have left or been removed.

Summary of Decision

48. The termination notice dated 01-September-2023 is invalid.

08-November-2023

Date


Seren Cahill
Residential Tenancies Office