Order under Section 69
Residential Tenancies Act, 2006

File Number: SWL-48792-21

In the matter of: 8, 31 JEAN AVENUE
KITCHENER ON N2A1P2

Between: Centurion Property Associates Inc. Landlords
Thresholds Homes and Supports Inc.

and

Debbie Kuehn Tenant

Centurion Property Associates Inc. and Thresholds Homes and Supports Inc. (the 'Landlords') applied for an order to terminate the tenancy and evict Debbie Kuehn (the 'Tenant') because: (a) the Tenant has substantially interfered with the reasonable enjoyment or lawful rights, privileges or interests of the Landlords or another tenant; and (b) the Tenant has seriously impaired the safety of any person. The Landlords also claimed compensation for each day the Tenant remained in the unit after the termination date.

This application was heard by video conference on July 23, September 7 and October 25, 2021.

The Landlords and the Tenant attended the hearings. The Landlord was represented by Peter Schroeder and the Tenant was represented by Shaun Harvey.

The Landlord summoned Lydia Wilson, a Fire Prevention Officer with the Kitchener Fire Department (‘KFD’), to provide evidence. Angie Sired and Zina Radocaj also testified for the Landlord.

I invited the parties to file written submissions, which they did. I have considered those submissions.

Determinations:

1. The residential complex is a multi-story apartment building managed by Centurion Property Associates Inc. (‘CPA’). The Tenant is a tenant of Thresholds Homes and Supports Inc. (‘THS’) which allowed occupancy of the rental unit by the Tenant and has a tenancy agreement with CPA.

2. THS is an organization that supports individuals with mental health and addiction issues in the community. It has approximately 200 employees of which 3 work as tenant liaisons. It has a portfolio of rental units that consists of owned properties and shared

arrangements such as exists with CPA and the Tenant. THS also provides rent-geared-to-income and subsidized housing.

3. THS offers support to its tenants in the form of, for example, side by side cleaning, (assisting tenants with cleaning,) taking tenants to doctors' appointments and providing referrals to other agencies in the community. Tenants are not obliged to take advantage of the support services offered by THS when they accept housing assistance from THS.

4. This case involves a hoarding disorder and the obligation of the Landlords to accommodate the Tenant. In particular, it involves a determination as to whether the Landlords have complied with their obligation under the *Human Rights Code*, RSO 1990, c H.19 (the 'HRC') to accommodate the Tenant to the point of undue hardship.

5. On January 12, 2021, the Landlords served a first (voidable) N5 notice with a termination date of February 2, 2021. Appendix A to that N5 identifies two instances where the Tenant permitted her dog to be 'off leash' on the grounds of the residential complex. The substance of the issues raised on the N5 relate, however, to clutter in the rental unit and the inability of the Landlord to treat the rental unit for pests as a result of that clutter.

6. The Landlords agree that the Tenant 'cured' the defaults alleged in the (voidable) N5 with respect to her dog being 'off leash', but not with respect to the clutter in the rental unit. No second (non-voidable) N5 was served by the Landlords.

7. On January 1, 2021, the Landlords also served an N7 notice with a termination date of February 12, 2021. Appendix A to the N7 references an Inspection Order issued by the Kitchener Fire Department based on the clutter in the rental unit and the actions taken by the KFD in connection with the clutter in the rental unit.

8. This application was filed by the Landlords on January 26, 2021.

Preliminary Issue

9. On the first attendance before me, the Tenant argued that the N5 and N7 notices were invalid and requested that the application be dismissed because the notices were invalid. I refused the Tenant's request and indicated that I would include reasons for my doing in my final order. The validity of the N5 and N7 notices was also addressed in the Tenant's written submissions.

10. I wish to begin by addressing the various grounds upon which the N5 and N7 notices may be invalid.

11. There are a number of cases, including cases decided by me, where the Board has found that where a voidable N5 notice is served at the same time as a (non-voidable) N7 notice and both notices are based on exactly the same grounds, the notices are invalid. Those cases invariably involve circumstances where the N5 and the N7 attach schedules or appendices that are identical.

12. The serving of a voidable N5 and a (non-voidable) N7 based on identical grounds gives rise, in my view, to: (a) the potential for confusion on the part of the tenant; and (b) a situation where the landlord, having elected to provide the tenant with an opportunity to preserve the tenancy by serving a voidable N5 notice that gives the tenant the right to 'cure' the alleged default(s), effectively deprives the tenant of the statutory right to preserve the tenancy by delivering a non-voidable N7 notice based on exactly the same alleged default(s). I note that the Board's approach to this situation is not uniform and there is at least one (unreported) case where the dismissal of an application based on the fact that the landlord served an N5 notice and an N7 notice based on the same allegations was reversed on review.

13. In this case, the N5 notice and the N7 notice are based on similar, but not identical allegations—the appendix attached to each notice is different.

14. While underlying both notices is the clutter in the rental unit, the N5 is based on allegations that relate to the ability of the Landlords to treat the rental unit for pests as a result of the clutter while the N7 is based on what I would describe as the 'health and safety issues that arise as a result of the clutter.

15. There is no possibility in this case that the Tenant was confused by the N5 and the N7 notices and there was no evidence that the Tenant was confused. N7 notice also did not, in my view, effectively deprive the Tenant of her statutory right o preserve the tenancy by curing the defaults alleged in the N5.

16. While one might question the practical reason for a landlord serving a voidable N5 and at the same time serving a (non-voidable) N6 or N7 notice, there is nothing inherently wrong with a Landlord serving multiple notices each of which might result in the termination of the tenancy and the eviction of the tenant provided that the tenant is not confused and the landlord does to deprive the tenant with the statutory right to preserve the tenancy. As noted in the Board's *Interpretation Guide 10—Procedural Issues Regarding Eviction Applications*:

    A landlord may believe there is more than one ground for eviction, and give a Notice with more than one ground or, more likely, two Notices of Termination together. The landlord may also find another ground for eviction while a Notice has not yet been resolved, and give another Notice for the new ground.
    …
    Although the landlord is permitted to give Notices of Termination with different termination dates, confusion to the tenant should be minimized. The Notices may be challenged on the basis that they are confusing and therefore defective. In the worst case, an application may be dismissed.

17. The Tenant argued in her written submissions that the N7 notice was not valid because of internal inconsistencies in the attached Appendix A. I have considered that argument and in my view that the N7 notice sufficiently conveys the issues with the clutter in the

rental unit and satisfies the requirements of *Ball* v *Metro Capital Management Inc.* **[[2002] OJ 5931 (Div Ct)]**[1] and section 43 of the *Residential Tenancies Act, 2006* (the 'Act').

18. The Tenant argued in her written submission that the N5 notice was invalid because it failed to 'failed to disclose what measures would be taken to accommodate the [T]enant's disability'. I have considered that argument and find that the N5 notice was sufficiently clear as to what conduct or action of the Tenant resulted in the notice being served. The Act does not require that a landlord set out on a notice delivered pursuant to the Act what steps have been (or will be) taken by the landlord to accommodate a tenant with a disability. **[See Act, s. 43]**

19. Finally, the Tenant argued in her written submission that the N5 and N7 notices are void because the Landlords did not attempt to accommodate the Tenant prior to serving the notices. I do not accept this argument.

20. There is no provision of the Act (or the HRC) that mandates that a landlord attempt to accommodate a disabled tenant prior to serving a notice of termination. The Tenant relies on *TSL-59271-15 (Re)* **[2015 CanLII 79679 (ON LTB)]** in support of her position in this regard. In that case, the Member did find that the Board cannot give effect to a notice that contravenes the HRC and that the landlord should have made efforts to explore with the tenant his disability-related needs prior to serving a notice of termination. With respect, I do not believe that this approach to dealing with the interplay between the Act and the HRC is correct and it does not appear to have been followed in other cases decided by the Board. In my view, issues relating to whether the landlord has complied with its obligation to accommodate are best dealt with as part of the analysis that the Board is required to make pursuant to section 83 of the Act and The approach of considering the issue of accommodation as part of the section 83 analysis is consistent, in my view, with other cases decided by the Board. I note that this was the Member's alternative basis for dismissing the application in TSL-59271-15 (Re). I have adopted that approach in determining this application.

Substantive Determination of the Application

21. A substantial amount of time was spent by the Landlords and the Tenant with respect to what has happened since the N5 and N7 notices were served. That evidence is relevant for the purposes of the inquiry that I am required to make pursuant to section 83 of the Act, but is not, in my view, relevant to whether the Landlords have established that they are entitled to an order terminating the tenancy and evicting the Tenant. In determining whether to terminate the tenancy and evict the Tenant, I am required to consider only the allegations made in the N5 and N7 notices.

22. I am satisfied that there was, at the time the N5 and N7 notices were served, a substantial amount of clutter in the rental unit. I find that this clutter: (a) interfered with the ability of the Landlords to treat the rental unit for pests; and (b) resulted in the KFD issuing an Inspection Order the reasons of which were:

[1] At the Board this case is typically referred to by reference to both parties, but it is technically "Metro Capital Management Inc., Re"

There is an accumulation of combustible contents inside the dwelling unit that exceeds the amount allowed for in the ordinary design of the building. The quantity of these combustibles create (sic) a life safety hazard to the occupants of the building by impeding the means of egress and increasing the intensity and rate of fire spread.

23. The Landlords have, in my view, established that the clutter in the rental unit (a) substantially interfered with the Landlords' lawful rights, privileges and interests by impeding the ability of the Landlord to treat the rental unit for pests; and (b) constituted a serious impairment to the safety of the Tenant and other residents of the residential complex. That is not, however, the end of the story and I must consider all of the relevant circumstances as required by section 83. That includes consideration of the HRC and whether the Landlords have established that they have complied with their obligations under the HRC.

Section 83

24. I have considered all of the disclosed circumstances and find that it would not be unfair to grant relief from eviction in accordance with paragraph 83(1)(a).

25. There is no dispute that the Tenant has a disability that has resulted in, or at least contributed to, the issues identified by the Landlords as being the basis for this application. When exercising discretion under section 83 of the Act, I must have regard to the Landlords' obligations under the HRC and whether they have complied with those obligations. It is not, in my view, unfair to deny eviction in circumstances where a landlord has failed to comply with its obligations under the HRC.

26. Where the grounds relied upon by a landlord to terminate a tenancy and evict a tenant arise as a result of the fact that the tenant has a disability, the landlord must, in my view, establish that it has accommodated the tenant to the point of undue hardship as required by the HRC. I find, for the reasons set forth below, that, in this case, the Landlords have not met this burden and this application should, as a result, be dismissed on the basis that it is not unfair to grant relief from eviction.

27. The matters raised by the Landlords on this application relate directly to the Tenant's disability and her inability as a result of that disability to keep the rental unit clutter-free. Section 33 of the Act, provides:

33 *The tenant is responsible for ordinary cleanliness of the rental unit, except to the extent that the tenancy agreement requires the landlord to clean it.*

28. There is no dispute that the Tenant suffers from a hoarding disorder that disability has an impact on her ability to comply with her obligations under section 33. This results in the HRC being relevant to any analysis with respect to whether the tenancy should be terminated and the Tenant evicted pursuant to section 69 of the Act.

29. Sections 11 and 17 of the HRC provide:

> ***11*** *(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,*
>
> *(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or*
>
> *(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.*
>
> *(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.*
>
> *(3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.*
>
> *…*
>
> ***17*** *(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.*
>
> *(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.*
>
> *(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.*

30. The issue that arises under both sections 11 and 17 of the HRC as it relates to this application is the requirement on the part of the Landlords to accommodate the Tenant to the point of undue hardship.

31. Section 11 of the HRC establishes that an otherwise neutral requirement such as that imposed by section 33 of the Act that results in the exclusion, restriction or preference can be justified where the requirement is reasonable and *bona fide*, but the Landlords must show that the needs of the Tenant cannot be accommodated without undue hardship on the part of the Landlords.

32. Section 17 sets out the Landlords duty to accommodate the Tenant. It is not discriminatory for the Landlords to deny the Tenant housing because the Tenant is incapable of fulfilling her obligations under section 33 of the Act as a result of her

disability. However, the Tenant will only be considered incapable if her disability-related needs cannot be accommodated by the Landlords without undue hardship.

33. The fundamental issue that I must determine when considering whether to exercise my jurisdiction under section 83(1) of the Act to deny or delay eviction is whether the Tenant's disability-related needs can be accommodated by the Landlords without undue hardship.

34. The Landlord asserts that they took steps to accommodate the Tenant. Although there were additional attempts made to accommodate the Tenant after the N5 and N7 notices were served, the steps taken by the Landlord to accommodate the Tenant prior to the N5 and N7 notices being served appear limited to entering into a mediated agreement to resolve a 2017 application brought by the Landlords based on similar allegations with respect to the clutter in the rental unit. The Landlord also relied on efforts by the KFD to assist the Tenant to de-clutter the rental unit, which efforts were ultimately halted by the Tenant.

35. The Landlord argues that the Tenant has not provided any evidence that she is: (a) seeking or obtaining support or assistance from any other source or agency; or (b) seeking treatment for her disorder. The issue before is not what the Tenant has (or has not) done, but whether the Landlords have accommodated the Tenant to the point of undue hardship. While I appreciate that it is open to the Landlords to argue that the Tenant has not co-operated with their efforts to accommodate, I am not prepared to find, based on the facts, that the Tenant has not co-operated with the Landlords efforts to accommodate her. As noted above, the Landlords efforts to accommodate the Tenant prior to serving the N5 and N7 notices were limited.

36. The Landlord argues in their written submission that the Tenant did not provide any evidence that showed that the Landlords have acted unreasonably or in any inappropriate manner. That is not the test that must be applied under the HRC. The Landlords must establish that they have accommodated the Tenant to the point of undue hardship.

37. The Landlords raised *Connelly* v *Mary Lambert Swale Non-Profit Homes* **[2007 CanLII 52787 (ON SDC)]** and argue that the conduct of the Tenant must be considered when assessing whether the Landlords have fulfilled their duty to accommodate. Connelly involved a drug addict dealing drugs from his rental unit. The Divisional Court rejected any suggestion that there was an obligation on the landlord to permit the tenant to deal drugs out of his rental unit to accommodate the tenant's disability. The Board had found that no accommodation was possible. I am not able to make that finding based on the facts of this case. To the contrary, I find that accommodation of the Tenant is possible.

38. The Landlords raised *Morguard Residential* v *Peters* **[2010 ONSC 2550 (ON SDC)]** That case involved an appeal from an order of the Board wherein the Board found as a fact that the tenant had no intention, and was incapable, of complying with section 33 of the Act. The Landlords argue that there is evidence that the Tenant has no intention of de-cluttering the rental unit or bringing it to a proper standard of cleanliness. I do not agree. While de-cluttering the rental unit is clearly a challenge for the Tenant, the evidence is

clear that she has made efforts to comply with section 33 of the Act and that the barrier to her de-cluttering the rental unit is her disability.

39. It was also the position of the Landlords that the Tenant has refused to take advantage of the support services offered by THS. While the Tenant has, for her own personal reasons, chosen not to take advantage of, and in fact reject, the support services offered by THS, there is no requirement that she do so and the evidence establishes, in my view, that the Tenant is prepared to take steps to address her disability. While Ms Wilcox indicated that the Tenant's efforts to address the clutter were not long-term effective, there is no dispute that the Tenant has made efforts to address the clutter and has, at one point at least, substantially addressed KFD's technical issues with the clutter in the rental unit.[2]

40. The Tenant has requested that the Landlord accommodate her by placing a shipping container in the parking lot of the residential complex into which the Tenant will move some of her possessions to de-clutter the rental unit. The Tenant asserts that she will be able to then sort through her possessions from the shipping container.

41. The Landlord has refused to accommodate the Tenant as requested.

42. The Landlord asserts that this request for accommodation was made after the application was filed. I do not think that is particularly relevant. I note that in Morguard the Divisional Court found that the tenant had an obligation to 'do her part' by ensuring that her request for accommodation was required to be before the Board. The Tenant's request for accommodation was before me and as part of my analysis under section 83 of the Act I must determine whether providing the Tenant with the requested accommodation would result in undue hardship to the Landlords.

43. The Landlords assert that: (a) the Tenant moving possessions from the rental unit to a shipping container will not resolve the issue identified on the N5 and N7 notices on a long-term basis because: (a) the Tenant will continue to accumulate in the rental unit; (b) to fully address the bedbug issue the Landlord will be required to treat the shipping container; and (c) the shipping container will occupy a space in the parking lot of the residential complex.

44. There is no disputing that, leaving aside the Landlords' concerns, the solution proposed by the Tenant will address the clutter in the rental unit and the concerns of the KFD.

45. The Landlords have provided me with no evidence upon which I am able to reasonably find that the requested accommodation would impose undue hardship on the Landlords and, in the absence of any evidence as to the impact on the Landlords of doing so, I am unable to accept that providing the Tenant with a space in the parking lot of the residential complex on a temporary basis to accommodate a shipping container constitutes, in and of itself, an undue hardship on the Landlords.

[2] I note that Ms Wilcox had a broader concern with respect to the health and safety of first responders required to attend at the residential complex that went beyond technical compliance.

46. The Landlords do not appear to have made inquiries of the Tenant as to the dimensions of the shipping container that the Tenant was considering such that they were in a position to assess the impact, if any, on placing the requested shipping container in the parking lot of the residential complex.

47. There was no evidence with respect to the cost (if any) to the Landlords of accommodating the Tenant[3] or with respect to the sources (if any) of outside funding that may be available.

48. There was substantial evidence before me from Ms Wilcox with respect to the issues of health and safety that arise from the clutter in the rental unit. That evidence related, however, to the health and safety impact of the clutter in the rental unit and did not address any health and safety requirements as they relate to the accommodation requested by the Tenant. There is no evidence upon which I could reasonably find that the accommodation requested by the Tenant gives rise to identified health and safety requirements such that the making of the accommodation would result in undue hardship to the Landlords.

49. There is evidence that the Tenant has had issues keeping the rental unit clutter-free on a long-term basis and in making my determination I have considered: (a) the prior mediated agreement between the Landlords and the Tenant; and (b) the evidence of Ms Wilcox that the Tenant made some progress in de-cluttering the rental unit, but that progress was short-lived. Those considerations do not change my view that the Landlords have not established that they have accommodated the Tenant to the point of undue hardship. I do not see speculation as to what **might** happen if the Tenant's request for accommodation is granted as being particularly relevant to whether the requested accommodation results in undue hardship to the Landlords.

It is ordered that:

1. The application is dismissed.

January 13, 2022
Date Issued

E. Patrick Shea
Member, Landlord and Tenant Board

South West-RO
150 Dufferin Avenue, Suite 400, 4th Floor
London ON N6A5N6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

[3] The Tenant has agreed to pay the cost to rent the shipping container.