

Order under Section 77(8)
Residential Tenancies Act, 2006

File Number: SWL-57980-22-SA

In the matter of: #13, 601 COLUMBIA FOREST BLVD
WATERLOO ON N2V2K7

Between: Tingting Liu

and

Zhanna Wohl (a.k.a Zhanna Wohl-Yerin)

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

SEPT 28 2022

Landlord and Tenant Board

Landlord

Tenant

Tingting Liu (the 'Landlord') applied for an order to terminate the tenancy and evict Zhanna Wohl (a.k.a Zhanna Wohl-Yerin) (the 'Tenant') because the Tenant gave a notice to terminate the tenancy. That application was resolved by order SWL-57980-22 issued on April 5, 2022.

The Tenant filed a motion to set aside order SWL-57980-22.

This motion was heard by videoconference on May 9, 2022.

The Landlord and the Tenant attended the hearing. The Landlord was represented by Ling Xi. The Tenant was represented by Shaun Harvey.

Also in attendance was the Landlord's witness Shimeng Jie (SJ) and Ling Yao (LY) as well as the Tenant's witness Vlad Nagorey (VN).

Determinations:

Preliminary Issue: Is Zhanna Wohl a Tenant?

1. At the beginning of the hearing, the named Tenant raised a preliminary issue with respect to her status as a Tenant. Specifically, she took the position that she was not a Tenant of the rental unit as she never lived at or occupied the rental unit.
2. ZW testified that since 2004, she has been living at another address in Waterloo. She testified that she rented the rental unit for her relatives; after they moved, another tenant (VN), who is her friend, moved into the rental unit.
3. ZW recalls the N9 notice to terminate the tenancy that forms the basis of the Landlord's L3 application as it had her name and signature on it; she testified that after she received the N12 notice of termination from the new Landlord, she gave the N9 with a letter explaining that she was not a Tenant of the rental unit, in response.

4. On cross-examination, ZW confirmed she filed this motion to explain to the Board her status and obtain a determination that she was not a Tenant. ZW could not confirm whether it was her signature on the last page of the tenancy agreement. ZW explained that the e-transfers that were sent to the Landlord from her on November 1, 2015, February 1, 2018, April 3, 2018 and July 20, 2021 were sent on behalf of the current tenant (VN) of the rental unit who was her friend and who had asked her to send them to the former Landlord because the former Landlord was ignoring him.
5. ZW also explains that she did not send the emails to the Landlord, their representative, or the building's property manager, that were provided in the Landlord's disclosure. Later, she confirmed that these emails were from her email account but had been sent by VN with her permission because the Landlord was not responsive to VN after June 2021. She testified she was helping her friend for humanitarian reasons but did not give him the authority to sign those emails on her behalf.
6. When I asked for clarification, ZW confirmed that she signed the lease agreement for Olga and her family members; she confirmed that she never lived there; she confirmed she paid \$1,400.00 in rent and utilities had been set up by VN. She could not recall whether VN lived at the unit in November 2015; she confirmed she did not let anyone else move into the rental unit; she confirmed that she signed the N9 and gave it to the new Landlord.
7. ZW seeks an order from the Board to confirm that she is not a Tenant as she did not have the keys to the unit, she did not access the unit nor did she ever have possession of the rental unit. She also confirmed that she has never been to the rental unit, never received mail at the rental unit and has no insurance on the property.
8. The Tenant's witness, VN, testified that he moved into the rental unit at some point in 2015/2016. VN testified that ZW told him that she had a place and gave him the Landlord's contact number; VN called the Landlord and got their permission to move into the rental unit. At that point, ZW's relatives lived there and moved out in 2016. VN testified that since he moved into the rental unit, he contributed to the expenses in the house and had the gas bill in his name.
9. On cross-examination, VN confirmed that he never signed a lease agreement with the former Landlord but that he was asked by her to check her mail and take care of the bills.

Landlord's Evidence

10. The Landlord's first witness, SJ, was the former Landlord and owner of the rental unit. She testified that she entered into a lease agreement with ZW on November 1, 2015- a copy of the signed lease was submitted into evidence. She testified that she received rent by e-transfer from ZW for three years, until April 2018. In January 2022, she sold the house and the title transferred over in March 2022. Between 2018 to the date she sold the rental unit, she did not receive rent from the Tenant.
11. On cross-examination, SJ confirmed that she was not aware that ZW never lived in the rental unit or that VN was living at the property and confirmed that she never had any conversations with him, nor did she permit him to live at the rental unit.

12. SJ confirmed that the Tenant was the only one who paid the rent between 2015 and 2018. She also confirmed that she was aware that the Tenant lived at her address in 2004 but not after. She confirmed that at all times during this tenancy, she received emails only from the Tenant.
13. The Landlord's second witness, LY, is the current Landlord's spouse and former Landlord's realtor. He testified that the former Landlord connected with him seeking assistance on the issue of rent arrears and interest in selling the rental unit. As such, he contacted the Tenant and spoke to her about her interest in purchasing the property.
14. In January 2022, his partner purchased the property which closed in March 2022.
15. Before the current Landlord served the Tenant with the N12, the parties attempted negotiating to help the Tenant find another place to live, however, the Tenant kept asking for more money, so those negotiations failed. A few days later, the Landlord served the Tenant with a N12 and the Tenant provided the Landlord with the letter and the N9.

ANALYSIS

16. Section 13 of the Residential Tenancies Act, 2006 states:

13 (1) The term or period of a **tenancy begins on the day the tenant is entitled to occupy the rental unit under the tenancy agreement.**

(2) A **tenancy agreement takes effect when the tenant is entitled to occupy the rental unit, whether or not the tenant actually occupies it.** 2006, c. 17, s. 13 (2).

[Emphasis added.]

17. This means that a tenant can be a tenant without actually occupying the rental unit provided that they have some connection to the rental unit as articulated in the case law below.
18. The leading and definitive case on the meaning of the phrase "in possession of the rental unit" is the Court of Appeal's decision in *1162994 Ontario Inc. v. Bakker*, 2004 CanLII 59995 (ON CA) ("Bakker"). It says at paragraphs 18 to 22:

[18]...I think the requirement that the tenant be "in possession of the rental unit" at the time of the application reflects a determination that rent arrears disputes can be resolved efficiently and fairly through the Tribunal **where the tenant at the time of the application continues to have some connection with the rental unit** and, therefore, some relationship with the landlord. Situations where that connection has been severed and the relationship gone are best resolved through the more formal court processes.

[19] Some further assistance in defining "tenant in possession" is found by an examination of s. 86(2). That subsection provides that a landlord

may be compensated for "the use and occupation" of a rental unit after notice of termination of the lease. A landlord can only be compensated, however, if the tenant is "in possession of the rental unit" when the landlord's application is made. **This suggests that a "tenant in possession" is a person who was using or occupying the rental unit at the time of the application but does not necessarily indicate that the phrase is limited to users and occupiers.**

[20] Possession is a difficult concept to define. Both in common and legal parlance, it connotes some form of control over the thing said to be possessed: e.g. D. Dukelow, B. Nuse, *The Dictionary of Canadian Law* 2nd ed., (1995) Carswell at p. 916; *The Shorter Oxford English Dictionary*, Vol. II (1973) p. 1635. Clearly, possession in s. 86(1)(b) is not limited to immediate physical control. For example, a tenant who locks up a rental unit and leaves on an extended vacation, continues to exercise sufficient control over that rental unit so as to qualify as a "tenant in possession" for the purposes of s. 86(1)(b). In my view, **possession of a rental unit refers to some form of control over that unit as demonstrated by factors such as access to, use of, or occupation of the unit.**

[21] There will be cases, although I would not think a great many, where a determination of whether the tenant was "in possession of the rental unit" at the time of the application will raise a difficult issue. In those cases, **the Tribunal will have to decide, based on the evidence, whether there is a sufficient connection between the rental unit and the tenant to permit a finding that the tenant was "in possession" of that rental unit.**

[22] In this case, there was no connection between Bakker and the rental unit at the time the s. 86 application was commenced. Bakker exercised no control over that unit. He had unequivocally, completely, and permanently vacated the unit more than two years before the application.

[Emphasis added.]

19. As can be seen from this extract, questions of possession are to be determined on a case-by-case basis. In this case, the Board is to determine what sort of control, if at all, ZW exercised over the unit at the time the application was filed, whether she had access to it, used it for any purpose, or otherwise had a connection to the rental unit.
20. Given the evidence before the Board, I am satisfied that ZW was in possession of the rental unit when her tenancy began to the date of the hearing. I say this based on the Tenant's own evidence that she signed the tenancy agreement (which is confirmed by the lease agreement submitted to the Board), she gave the Landlord a N9 notice to terminate the tenancy when she received the N12 from the Landlord (as confirmed by her testimony), she paid the rent to the Landlord (as confirmed by the e-transfers submitted

as evidence) and she communicated with the Landlord throughout her tenancy (as confirmed by the emails submitted to the Board). I do not find a person who maintains that they moved out in 2019 would have a connection to the rental unit to this extent thereafter. Further, while the Tenant claims she gave her notice in 2019 to the former Landlord, a copy of this notice was not submitted into evidence nor did the former Landlord confirm this to be the case.

21. While it is possible that the Tenant did not live in the rental unit, I find that the Tenant exercised a significant amount of control over with respect to who could access and maintain occupancy in her rental unit.
22. While the Tenant suggests and VN's testimony confirms that he connected with the Landlord directly to live in the rental unit – no documentary evidence was submitted to the Board to confirm this. In fact, VN confirmed that he did not sign a lease agreement with the Landlord. Further, the former Landlord herself confirmed that she had no communications with VN in this regard.
23. On a related note, while the Tenant suggests that VN moved in on his own motion after her family moved out, I do not find this to be the case as VN's testimony confirmed that he lived in the rental unit during the time ZW's family lived there and ZW confirmed that she permitted her family to live there and signed the lease for this reason.
24. Following this logic, I find that ZW permitted VN to live at the rental unit as VN alluded to when ZW told him she had a rental unit available. The fact that VN had his name on the gas bill further supports the finding that he moved in with ZW's permission as clause 6 of the lease agreement states the Tenant agrees to transfer the hydro and gas to their own name no later than November 5, 2015.
25. Thus, I find that ZW was in possession of the rental unit and maintains possession of the rental unit as of the hearing date and is therefore properly named as a Tenant.

Motion to Set Aside

26. The Landlord's L3 application is based on a N9 notice to terminate the tenancy signed by the Tenant terminating the tenancy on April 2, 2022 and provided to the Landlord on March 23, 2022. Pursuant to subsection 77(1)a of the Act, the Landlord filed an L3 application on March 25, 2022 and obtained an eviction order on an ex parte (meaning without hearing) basis.
27. On April 16, 2022, the Tenant filed a motion to set aside this ex parte order. In her motion she asserts that the Landlord forced her to give the notice to terminate the tenancy.
28. This motion was brought pursuant to subsection 77(8) of the Residential Tenancies Act, 2006 (the 'Act'). It essentially requires the Board to determine the following:
 - a) First, did the Tenant provide a notice to terminate the tenancy?
 - b) Second, if she did, is the Board satisfied "having regard to all the circumstances, that it would not be unfair" to set aside the eviction order?

- c) Third, and if it would be unfair to set aside the order, should the lifting of the stay of the eviction order be delayed for some reason?
29. The Tenant testified that in March 2022, she received the N12 notice of termination from the new Landlord. She testified that she provided the Landlord with a N9 for termination of the tenancy ten days later, the following day.
30. The Landlord disputes ever forcing the Tenant to sign the N9. She testified that after she purchased the property, the parties tried to work out a negotiation whereby the Landlord would compensate the Tenant for the hassle of moving out, but this did not work out. The Landlord proceeded to serve the N12 notice of termination and in response, received the N9 notice to terminate the tenancy when the Landlord met the Tenant at Tim Hortons.
31. The Landlord submits that she was not in a position to threaten the Tenant or coerce her into signing the N9 in a public space nor would she ever do so. In fact, she was afraid to meet the Tenant at night, alone, in a public setting.
32. The Landlord seeks that the Tenant's motion be denied and the stay be lifted immediately.

ANALYSIS

33. Based on the evidence before me, I find that the Tenant provided the Landlord with a notice to terminate the tenancy on April 2, 2022. I find this notice to be valid as it was served in response to a N12 notice of termination that only requires 10 days notice.
34. I do not find this notice to be the result of undue coercion or pressure by the Landlord. I say this because the parties did not agree to terminate the tenancy (N11) rather, the Tenant gave a notice to vacate after receiving the N12 from the Landlord.
35. What appears to be the case is that the Tenant and/or her occupant has not been able to secure a new home, perhaps resulting in remorse for signing the N9 hastily, leading to the set aside motion before the Board today.
36. I also prefer the evidence of the Landlord because her evidence remained certain and consistent throughout while the Tenant's account changed significantly during the hearing. For example, the Tenant's written motion says she was forced to sign but she admits that she signed it after receiving the N9. Another example is the Tenant initially indicated she could not confirm whether it was her signature on the lease agreement but afterwards confirmed that she signed the document. These inconsistencies undermine the credibility of the Tenant's evidence.
37. The next question, then, is whether under all of the circumstances, it would not be unfair to set aside the eviction order.
38. In a recent decision, *Pinto v. Regan and White v. Regan*, 2021 ONSC 5502, which was about two separate Tenants who signed a N11 agreement to terminate the tenancy on the basis that the Landlord required the rental unit for major renovations; no N13 notice of termination was served, the Tenants were each compensated, the Landlord refused the

Tenant's request to move back into the rental unit after these renovations and both filed a motion to set aside the order on the basis of being misled by the Landlord.

39. The Courts found that the Board had a duty to scrutinize the real substance of the transactions that took place between the participants and to decipher the "essential facts ... on the day each N11 was signed."
40. I find that the case before the Board is distinguished from *Pinto v. Regan and White v. Regan* because the parties did not sign a N11 or an agreement to terminate the tenancy – rather, the Tenant provided a notice to terminate the tenancy.
41. In this case, I find the Landlord was transparent with the Tenant and provided her with all the necessary information required to make an informed decision. I do not find that the Landlord misled the Tenant or tricked her. In fact, the Tenant negotiated the termination date herself and there is nothing before the Board that indicates that she did not have time to review this agreement – I say this based on her own admission that she gave the notice a day after receiving the N12.
42. As such, I do not find it would be fair under the circumstances to set aside the order. With respect to lifting the stay, as no submissions were made in this regard and the Tenant maintains the position that she does not reside in the rental unit, the stay shall be lifted immediately.
43. This order contains all of the reasons for my decision within it. No further reasons shall be issued.

It is ordered that:

1. The motion to set aside Order SWL-57980-22, issued on April 5, 2022, is denied.
2. The stay of order SWL-57980-22 is lifted immediately.
3. Order SWL-57980-22 is unchanged.



September 28, 2022
Date Issued

Sonia Anwar-Ali
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.