Landlord and Tenant Board

Order under Section 21.2 of the
Statutory Powers Procedure Act
and the **Residential Tenancies Act, 2006**

File Number: TSL-23092-11-RV

Review Order

S.T. (the 'Landlord') applied for an order to terminate the tenancy and evict B.S. (the 'Tenant') because she, another occupant of the rental unit or someone she permitted in the residential complex has wilfully caused undue damage to the premises; and because she, another occupant of the rental unit or a person the Tenant permitted in the residential complex seriously impaired the safety of any person. The Landlord has also applied for an order requiring the Tenant to compensate the Landlord for the damage.

This application was resolved by order TSL-23092-11 issued on December 21, 2011.

On December 23, 2011, the Tenant requested a review of the order.

The request was heard in Toronto on January 19, 2012.

The Landlord and the Tenant's representatives, R.V. and L.R. from P.C.L.S, attended the hearing. The Landlord called as a witness: J.L. (the 'Property Manager'). The Tenant called as a witness: K.M. (the 'Occupant').

Determinations:

The Review

1. At the beginning of the hearing I explained the review process to the parties and asked the Landlord if she was willing to consent to the review being granted. She asked me if consenting would mean that the application would be re-heard that day and when I said it would, she consented to the Tenant's request for review being granted. As a result, an order will issue cancelling order TSL-23092-11 issued on December 21, 2011 as null and void.

2. The Tenant paid $50.00 to the Board to file the request for review. Pursuant to section 182 of the *Residential Tenancies Act, 2006* (the 'Act') an order will issue requiring the Board to refund to the Tenant this fee.

The Landlord's Application for Eviction

<u>The Validity of the Notice to Terminate</u>

3. The documents filed with the Board indicate that the Landlord served the notice of termination on the Tenant by leaving it with the building's concierge service. They apparently offer an internal mail service to residents where people sign a log indicating they have left mail for another resident. A dot is then placed on the recipient's mail box to

signal to that person mail is being held by the concierge for pick up. When the mail is retrieved from the concierge the recipient must also sign the log.

4. The reason this is important is because this method of service is not one which is authorised by the Act and a notice of termination is not valid if it is not properly served within the time lines required. However, subsection 191(2) says that: "A notice or document that is not given in accordance with this section shall be deemed to have been validly given if it is proven that its contents actually came to the attention of the person for whom it was intended within the required time period." It was the evidence before me that the Occupant signed for the notice of termination on December 12, 2011 and handed it to the Tenant that same day. As a result, I am satisfied that the Tenant received the notice of termination on December 12, 2011 and as the date of termination on it is December 23, 2011 she received the amount of notice required by the Act.

5. The Tenant's representatives raised a preliminary issue and argued that the notice of termination served on the Tenant should be declared invalid as lacking in details as required by the *Residential Tenancies Act, 2006* (the 'Act') and elucidated upon by the Divisional Court in *Ball* v. *Metro Capital Property*, [2002] O.J. No. 5931.

6. The problem that was addressed in *Ball* v. *Metro Capital Property* is the meaning of what is now subsection 43(2) of the Act which says that a notice of termination given by a landlord must "set out the reasons and details respecting the termination". The landlord in *Ball* v. *Metro Capital Property* had served a notice of termination which said merely that the tenant had substantially interfered with the reasonable enjoyment of the landlord by "harassing building staff and office employees to the point of inhibiting them from performing their daily duties". It therefore provided the tenant with no information concerning what behaviour the landlord was actually complaining about that it considering harassment. The Court concluded the notice lacked sufficient details because the purpose of the notice was to ensure the tenant knew the case to be met and was in a position to decide whether or not to dispute the allegations at a hearing. (The notice in *Ball* v. *Metro Capital Property* also served a third purpose in that it was served pursuant to what is now section 64 of the Act which indicates a tenant must be given seven days to comply with the notice to avoid eviction by ceasing the behaviour complained of. This third purpose of the notice of termination in *Ball* v. *Metro Capital Property* has no relevance to the notice served on the Tenant in this case as it was not served pursuant to section 64 and there is no opportunity to void the notice by complying with it and ceasing the behaviour complained of.) The Court concluded that the kinds of particulars that should be contained in a notice which was about a tenant's behaviour should include "dates and times of the alleged offensive conduct together with a detailed description of the alleged conduct engaged in by the tenant".

7. In the application before me the notice of termination served on the Tenant included a lengthy paragraph on the Board's standard form under "details". In addition, attached to the notice were two letters that had been sent to the Tenant by the management company for the condominium corporation within which the rental unit is located. The "details" on the notice specifically refers to the two attached letters. Although I would agree that the part of the details that are on the notice itself are not helpful in describing specific conduct of the Tenant being complained of, that is not true of the attached letters.

8. The letter dated September 30, 2011 provides a detailed description of the behaviour of the Occupant during one particular incident that includes the date and time of it.

9. The letter dated November 25, 2011 addressed to both the Tenant and the Occupant indicates that other residents of the building had complained about the smell of cigarette smoke in the common hallway which the property management corporation believed was coming from the rental unit. It seems to me unlikely in a situation where the complaint is that the Tenant is causing an unpleasant odour that it would be possible to provide many further particulars like "dates and times" as the complaint is that the odour is pervasive so it would not really be possible to figure out exactly when the smoking was occurring or even who was doing it. A landlord cannot be expected to provide particulars that it is impossible for the landlord to know or ascertain.

10. As a result, I am satisfied that the details provided with the notice of termination served on the Tenant were more than sufficient for the Tenant to understand the case to be met and to make a decision concerning whether or not she wished to dispute them at a hearing. Therefore, and as I indicated at the hearing I do not believe the notice is invalid for want of particulars and the hearing proceeded on that basis.

The Allegation that the Occupant Seriously Impaired the Safety of Any Person

11. There was actually no dispute between the parties that an altercation occurred between the Property Manager of the condominium corporation and the Occupant. The witnesses differed with respect to the details but essentially what happened was the Occupant was angry about allegations that he had made an obscene gesture to the Property Manager on a previous occasion. He approached her in the lobby and called her a liar, they both became upset, and the Occupant left. The Property Manager apparently then went about her business; the security personnel who were watching did nothing in response; and no one called the police about the incident.

12. The Property Manager testified that during this incident the Occupant brushed lightly against her shoulder in passing, which the Occupant denied. The letter that was sent on September 30, 2011 to the Tenant about this incident was written within days of it occurring. That letter makes no mention of physical contact being made between the Occupant and the Property Manager and yet otherwise contains a detailed description of it. It seems to me that if the Tenant had actually touched the Property Manager in an offensive or violent way then the letter most certainly would have said so. As a result, I am not prepared to accept the Property Manager's testimony over that of the Occupant's with respect to physical contact being made.

13. That being said, I do not believe it makes much difference to the outcome in this case if the Occupant brushed shoulders with the Property Manager or not. I say this because the notice served on the Tenant relies on section 66 which says in part: "A landlord may give a tenant notice of termination of the tenancy if… an act or omission of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant **seriously impairs or has seriously impaired the safety of any person**". [Emphasis added.]

14. Clearly this incident did not in any way impair the safety of the Property Manager. She was physically unhurt and suffered no physical side effects from it. I have no doubt she was very upset, and perhaps rightly so, but being upset at the boorish behaviour of another person does not constitute an impairment of safety let alone a "serious" one. It might be that the behaviour of the Occupant could be the basis of a notice of termination for substantial interference with the reasonable enjoyment of the Landlord under section 64 of the Act but the Landlord chose not to serve such a notice.

15. As a result of all of the above, the Landlord's application for eviction based on the allegation that the Occupant seriously impaired the safety of another person in the residential complex must be dismissed.

The Allegation that the Tenant or the Occupant Wilfully Damaged the Residential Complex

16. In addition to the above, the notice of termination served on the Tenant essentially alleges that the Occupant smokes in the rental unit, that his cigarette smoke has penetrated the walls and floors of the common hallway, and that this behaviour constitutes wilful damage to the residential complex.

17. This part of the notice of termination is based on paragraph 63(1)(a) of the Act which says in part: "a landlord may give a tenant notice of termination of the tenancy … if the tenant, another occupant of the rental unit or a person whom the tenant permits in the residential complex… **wilfully causes undue damage** to the rental unit or the residential complex'. [Emphasis added.]

18. The Tenant's representatives quite rightly pointed out that the Landlord did not serve notice of termination pursuant to section 62 which also addresses the situation where a tenant is alleged to have caused undue damage. One of the differences between sections 62 and 63 is that section 62 also includes the situation where a tenant, occupant or guest, negligently causes undue damage whereas section 63 can only be relied on where the damage was wilfully caused.

19. It was the evidence before me that occupants of the residential complex living on the same floor as the Tenant and the Occupant have complained to the property management company that the smell of cigarette smoking coming from the Tenant's unit has entered their own units and lingers in the common hallway. One of the occupants is apparently allergic to cigarette smoke. The Property Manager issued a general notice to all of the residents on the same floor listing ways that residents can prevent odours from their units migrating to the common hallways. When the complaints continued she investigated the source of the odour by going up to the shared hallway on more than one occasion. According to her she could identify that there was an odour of cigarette smoke coming from the Tenant's unit by standing outside the door. After that she wrote to the Tenant and the Occupant reminding them that the lease the Tenant signed with the Landlord says the rental unit is non-smoking, that the condominium corporation's rules prohibit the transmission of odour from one unit to another, and that smoking is not permitted in any of the common areas. The Occupant testified that he smokes cigarettes on the balcony of the rental unit but not in the unit itself.

20. The difficulty with the Landlord's application with respect to eviction for the Occupant's smoking is that she served notice of termination for wilful damage instead of a notice for substantial interference. In order to succeed on an application based on a notice issued pursuant to paragraph 63(1)(a) of the Act, a landlord must establish three things: that the damage caused by the behaviour complained of is "undue"; that the person responsible for causing the damage is a tenant, occupant or guest; and that the damage was wilfully or intentionally caused. In order to prove that damage is wilfully caused the landlord must lead some evidence to support the proposition that the person deliberately caused the damage in question.

21. Here, the only evidence before me with respect to the Occupant's knowledge and intentions was the Occupant's evidence to the effect that the Tenant does not like the smell of smoke so he always smokes on the balcony, and that he was aware that the Landlord believes that cigarette smoke is damaging to the rental unit but he did not agree with her belief. The Landlord also introduced into evidence a text message where the Occupant apologised to the Landlord because of the letter she received about his smoking but in it he does not apologise for being a smoker and informs her that he never breaches the lease because he always smokes outside on the balcony. In other words the evidence supports the conclusion that the Occupant believes he is taking reasonable steps to ensure his smoking does not disturb anyone. That belief may be false but that is clearly what he believes. As a result, the evidence might support the conclusion that the Occupant negligently caused the smell of smoke to enter into the hallway, and would almost certainly support the proposition that the Occupant interfered with a lawful right, privilege or interest of the Landlord's, but it does not support establish that it is more likely than not that the Occupant wilfully or intentionally caused damage to the common hallways. As a result, I do not believe the Landlord is entitled to evict the Tenant based on the notice of termination served on her in this case and that part of the Landlord's application must be dismissed.

The Landlord's Application for Damages

22. The Landlord's application also included a claim made pursuant to subsection 89(1) of the Act which says a landlord may apply to the Board for an order requiring a tenant to pay the reasonable costs that the landlord has incurred or will incur for the repair of wilfully or negligently caused undue damage to the rental unit or the residential complex.

23. It may be that the Occupant's smoking has negligently caused damage to the common hallways that will require "defuming" as the Landlord and the Property Manager believe, but it is not necessary for me to make such a finding here as no evidence was led at the hearing before me with respect to the reasonable cost that would be incurred to repair the alleged damage. No contractors have visited to inspect the area in question. No quotes have been obtained. No examples of the cost involved in doing similar work in the past were offered. It is the Landlord's obligation on an application such as this to lead evidence that would establish the reasonable cost of repairs. The Court of Appeal made it very clear in *First Ontario Realty Corp.* v. *Deng,* [2011] O.J. No. 260, that in granting a remedy the Board must have some evidence, or precedent, or expertise to draw on. In other words, the Board is not permitted to pull a number out of the air. Absent any evidence of the reasonable cost of repair the Board has no jurisdiction to award any

amount under subsection 89(1) even if the Landlord's evidence had established the Occupant did indeed cause undue damage to the common hallway.

24. As a result of all of the above, the Landlord's application shall be dismissed in its entirety.

25. This order contains all of the reasons for my decision within it. No further reasons shall be issued.

It is ordered that:

1. Order TSL-23092-11 issued on December 21, 2011 is cancelled and the application filed by the Landlord is dismissed.

2. The Board shall refund to the Tenant the $50.00 cost she incurred for filing the review.

January 25, 2012
Date Issued

_____
Ruth Carey
Member, Landlord and Tenant Board

Toronto South-RO
79 St. Clair Avenue East, Suite 212, 2nd Floor
Toronto ON M4T1M6

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