[2020] NZTT Hamilton 4279083

TENANCY TRIBUNAL AT Hamilton

APPLICANT:	Robert Joseph Atkinson Tenant
RESPONDENT:	Monarch Realty Limited Landlord
TENANCY ADDRESS:	24 Morrow Avenue, Saint Andrews, Hamilton 3200

ORDER

1. The 90-day notice to vacate issued on 22 September 2020 is declared retaliatory and is of no effect.
2. The landlord must pay the tenant the filing fee of $20.44.

Reasons:

1. Mr Atkinson appeared. Ms Lee appeared for the landlord.
2. A periodic tenancy commenced on 12 January 2016. The parties to the tenancy agreement were the Tenant and Mr Adrian Austin, owner. The property was managed by Davies Property Management who are described in the tenancy agreement as the Landlord's Agent.
3. On 29 October 2020, Mr Austin engaged Monarch Realty Limited to act as agent replacing Davies Property Management. Pursuant to section 2(1) of the Residential Tenancies Act 1986 (The "Act") both Mr Austin and Monarch Realty Limited meet the definition of the landlord.
4. On 22 September 2020, Monarch Realty Limited gave the tenant a 90-day notice to vacate the property on 21 December 2020. The notice is valid and was properly served on the tenant. On 20 October 2020, within 28 days of receiving the notice, the tenant filed a claim alleging that the notice was retaliatory.
5. The onus of proving this claim rests with Mr Atkinson. The standard of proof is on the balance of probabilities. Mr Atkinson must satisfy the Tribunal that more likely

than not the landlord has breached the provisions of the Residential Tenancies Act 1986 (The "Act"). If after hearing the evidence I reach the conclusion that it is likely that the notice to vacate was retaliatory then I have not been satisfied to the required standard, as I must be satisfied *more likely* than not.

Facts

6. The tenant resides at the property with his partner, their young child, and a flatmate. The property is described as having been built in the 1980s and has three bedrooms, toilet, bathroom, kitchen, dining room, lounge and a laundry.

7. Mr Atkinson states that on 05 July 2020 there was a substantial leak in the bedroom occupied by the flatmate. Mr Atkinson states that the property has a flat roof and an internal guttering system. Mr Atkinson states that the guttering had become blocked and rusted out, through lack of maintenance, and that water had leaked through and down the inside of the wall. Mr Atkinson has produced a photograph of the leak. The leak was reported to the landlord who arranged for a trade to attend and repair the gutter. Mr Atkinson states that following the leak, moisture levels were elevated forcing the tenant to run a dehumidifier for extended periods of time.

8. On 19 July 2020, Mr Austin visited the property to inspect the damage. On 22 July 2020, Ms Lee advised of an intention to complete remedial work. This remedial work which involved relining walls, installing new carpet and replacing curtains was commenced on 11 August 2020, and completed on 09 September 2020. Mr Atkinson states that the room was uninhabitable from 06 July 2020 to the completion of the work on 09 September 2020 during which time the flatmate did not occupy the room or pay rent.

9. Mr Atkinson states that during the repairs the landlord, whom it is claimed resides in Auckland, visited the property unannounced on 13 August 2020, the day before Auckland re-entered alert level 3. Mr Atkinson was not at the property at the time but claims that Mr Austin advised his partner, who was home with their young child, that the timing of his visit was to avoid the looming Covid-19 restrictions. Mr Atkinson was of the view that the landlord's actions were irresponsible and had placed his family at risk.

10. Pursuant to section 48(1) of the Act, the landlord shall not enter a property during the tenancy except with the consent of the tenant freely given, at or immediately before the time of entry, or in the case of an emergency, or with proper notice. There is no claim and no evidence on which to conclude that the landlord was in breach of their obligations. Mr Atkinson also states that over the period various trades attended, often unannounced. On 24 August 2020, Ms Lee sent Mr Atkinson an email in which she advised that Mr Austin apologised for his unscheduled visit and any discomfort it may have caused. To compensate the tenant for any inconvenience, the landlord also advised that rent would be reduced by $80.00 a week for three weeks.

11. On 28 August 2020, Mr Austin sent Ms Lee an email stating he had been advised by a curtain professional who had visited the property to measure and quote for replacement curtains, that the curtains and nets in the rooms not affected by the leak were in a “complete state of disrepair”. Mr Austin advised Ms Lee that as he had made a significant outlay completing the remedial work, he wanted to ensure that the tenant understood their obligation to properly ventilate the property.

12. On 01 September 2020, Ms Lee replied that she was concerned that while the tenant paid their rent on time and had been accommodating during the remedial work, she was unsure as to whether they could meet their obligations to properly ventilate the property. Ms Lee advised Mr Austin that in February 2021 a new law removing the ability of landlords to give “no cause” 90-day notices would come into effect, and to protect his investment that he might like to consider issuing a 90-day notice.

13. Ms Lee states that following the email she had two further discussions with Mr Austin, after which a decision was made to serve a 90-day notice. Ms Lee states that it was decided to wait until 22 September 2020, as if issued on that date the 90-days would expire just before Christmas over which period Mr Austin would complete further work on the property before re letting the property. Ms Lee has produced an electronic diary which contains an entry on 22 September 2020, “Issue 90-day notice to 24 Morrow Ave ??: Ring owner first”. Ms Lee states that the entry was made at the time of the decision to issue the notice.

14. Mr Atkinson states that on 15 September 2020, he received a call from Ms Lee concerning a rent increase to $470.00 per week. Ms Lee has also produced an electronic diary entry confirming the date of the call. Mr Atkinson states that the conversation turned to issues concerning maintenance. Mr Atkinson states that in 2019 he raised the issue of “loose, drafty and unsafe aluminium joinery”. Mr Atkinson states that while the landlord had attempted to address the matter, in his opinion the issue remained unresolved.

15. Mr Atkinson states that during the call he suggested that if the landlord wanted a market rent, that they should maintain the property to a reasonable “market” standard. In the call Mr Atkinson also raised “a lack of preventative maintenance” which in his view resulted in the gutters rusting out and the subsequent water damage. Mr Atkinson also states that he shared his general dissatisfaction at the amount of time it had taken to complete the remedial works.

16. Seven days later, on 22 September 2020, Mr Atkinson received a 90-day notice from Monarch Realty Limited to vacate the property on 21 December 2020. Mr Atkinson states that he had anticipated receiving a notice of rent increase and was shocked and dismayed to instead receive a notice to vacate.

17. Mr Atkinson argues that in issuing the notice, the landlord was at least partly motivated by his complaints. Ms Lee denies that the landlord was so motivated

and states that a decision to issue a notice to vacate was made before and not influenced in any way by the phone call.

Law – retaliatory notice

18. For a notice to be declared retaliatory, the tenant must prove that in terminating the tenancy the landlord was motivated wholly or partly by the tenant exercising or proposing to exercise a right, power, authority or remedy conferred on the tenant by the tenancy agreement or by this or any other Act or any complaint by the tenant against the landlord relating to the tenancy, a right under the tenancy agreement or any Act, or by any complaint against the landlord. See section 54(1) Residential Tenancies Act 1986.

19. In *Easton v Marks* Auckland TT 229/87, 27 May 1987 the Tribunal considered "motivate" as meaning "to furnish with a motive or motives; to give impetus to, to incite, to impel" and held that the landlord was not incited or impelled by the tenant's actions.

Decision

20. The onus is on Mr Atkinson to satisfy the Tribunal that more likely than not the landlord, in issuing the notice, was wholly or partly motivated by his complaints.

21. I am satisfied that in his phone call Mr Atkinson was making a complaint relating to his right that the landlord maintains the property in a reasonable state of repair.

22. The question marks at the end of the diary entry, "Issue 90-day notice to 24 Morrow Ave ??: Ring owner first", suggests that at the time of recording the entry a firm decision may not have in fact been made to issue the notice. There is no documentary evidence, letter or email, confirming Mr Austin's instructions or intentions. I cannot rule out that the final decision to issue the notice may not have been partly influenced by the phone call of 15 September 2020.

23. Having considered the evidence I am satisfied to the required standard that in issuing the notice on 22 September 2020 the landlord was at least partly motivated by the complaints made by Mr Atkinson on 15 September 2020.

24. As Mr Atkinson has succeeded with the claim I must reimburse the filing fee.

G Barnett
07 November 2020

Please read carefully:

Visit justice.govt.nz/tribunals/tenancy/rehearings-appeals for more information on rehearings and appeals.

Rehearings

You can apply for a rehearing if you believe that a substantial wrong or miscarriage of justice has happened. For example:

- you did not get the letter telling you the date of the hearing, **or**
- the adjudicator improperly admitted or rejected evidence, **or**
- new evidence, relating to the original application, has become available.

You must give reasons and evidence to support your application for a rehearing.
A rehearing will not be granted just because you disagree with the decision.
You must apply within five working days of the decision using the Application for Rehearing form: justice.govt.nz/assets/Documents/Forms/TT-Application-for-rehearing.pdf

Right of Appeal

Both the landlord and the tenant can file an appeal. You should file your appeal at the District Court where the original hearing took place. The cost for an appeal is $200. You must apply within 10 working days after the decision is issued using this Appeal to the District Court form: justice.govt.nz/tribunals/tenancy/rehearings-appeals

Grounds for an appeal

You can appeal if you think the decision was wrong, but not because you don't like the decision. For some cases, there'll be no right to appeal. For example, you can't appeal:

- against an interim order
- a final order for the payment of less than $1000
- a final order to undertake work worth less than $1000.

Enforcement

Where the Tribunal made an order about money or property this is called a **civil debt**. The Ministry of Justice Collections Team can assist with enforcing civil debt. You can contact the collections team on **0800 233 222** or go to justice.govt.nz/fines/civil-debt for forms and information.

Notice to a party ordered to pay money or vacate premises, etc.

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.

If you require further help or information regarding this matter, visit tenancy.govt.nz/disputes/enforcing-decisions or phone Tenancy Services on 0800 836 262.

Mēna ka hiahia koe ki ētahi atu awhina, kōrero ranei mo tēnei take, haere ki tenei ipurangi tenancy.govt.nz/disputes/enforcing-decisions, waea atu ki Ratonga Takirua ma runga 0800 836 262 ranei.

A manaomia nisi faamatalaga poo se fesoasoani, e uiga i lau mataupu, asiasi ifo le matou aupega tafailagi: tenancy.govt.nz/disputes/enforcing-decisions, pe fesootai mai le Tenancy Services i le numera 0800 836 262.