



Order under Subsection 74(14)
Residential Tenancies Act, 2006

File Number: SOL-17392-20-VO

In the matter of: UPPER UNIT, 4 ALBERT STREET
LANGTON ON N0E1G0

Between: Sunny Abraham Landlord

and

Carrie Butler Tenant

Sunny Abraham ('SA' or the 'Landlord') applied for an order to terminate the tenancy and evict Carrie Butler ('CB' or the 'Tenant') because the Tenant did not pay the rent that the Tenant owes.

The application was resolved by SOL-17392-20 issued May 11, 2021.

The Tenant filed a motion to set aside order SOL-17392-20 because, before the eviction order was enforced, the Tenant paid the amount required under subsection 74(11) of the *Residential Tenancies Act, 2006* (the 'Act') to void the order.

This motion was heard by videoconference on August 4, 2021.

The Tenant, the Tenant's Legal Representative, Kimberly Farrell ('TTR'), the Landlord and the Landlord's Legal Representative, Judy Cayford ('LLR'), attended the hearing. Shane McCartney ('WIT') provided testimony on behalf of the Landlord. James Morgan, a second counsel for the Landlord, had signed into the hearing, but he only observed the proceedings, making no submissions during the hearing.

Procedural History:

1. The Landlord originally applied to terminate the tenancy because of rent arrears. In SOL-17392-20, heard on April 13, 2021, the Board issued a standard order dated May 11, 2021 (the 'Board Order'). The Board Order provided that the Tenant could void the order and continue the tenancy by paying \$8,686.00 by May 31, 2021..
2. The Tenant filed a Request-to-Review the Board Order on May 26, 2021, alleging there were serious errors in the Board Order. A preliminary review was conducted and the Board issued review order SOL-17392-20-RV on June 8, 2021, dismissing the Tenant's review request.
3. The Sheriff's Office issued a Notice to Vacate dated June 15, 2021, notifying the Tenant that eviction would be enforced on July 2, 2021.

4. At approximately 5:26 pm on June 29, 2021, the Tenant filed this Motion to Void the Board Order on the ground that all of the arrears and costs had been paid. (I note the Tenant dated her documents as July 29, 2021, but it is clear the motion was filed on June 29, 2021.)
5. The Tenant's motion indicates that \$8,261.00 was paid on June 22, 2021 and \$425.00 was paid on June 29, 2021.
6. Sometime between 10:30 am and 12:00 noon on July 2, 2021, the Board Order issued a stay on the enforcement of order SOL-17392-20 and scheduled this hearing for the Tenant's motion. The stay and Notice of Hearing were emailed to the parties.
7. The Sheriff enforced the eviction on July 2, 2021, at approximately 10:10 am. It appears that the Board's stay was sent to the parties by email after the time the Sheriff enforced the order.
8. On July 19, 2021, the Tenant filed a request for the Board to issue an Interim Restoration order or an Interim Preservation Order. A Duty Vice-Chair issued an Endorsement dated July 19, 2021, denying the request, stating:

"At the time that the Board Stay order was issued, the Board Order issued on May 11, 2021 had been enforced by the Court Enforcement Office (The Sheriff).

The representative relies on Rule 1.6 of the Board Rules of Practice to make these Interim orders.

The representative has not referred to a section of the Residential Tenancies Act, 2006 (the 'Act') to show where the Board has authority to restore a Tenant or preserve a tenancy after said Tenant has been lawfully evicted under the Act. Tenant applications, under s. 29 does not include such authority. In addition, I would note that s. 31 of the Act is also not applicable in these circumstances.

The SPPA, s. 23(1) does permit the Board to make orders where it is proper to do so to prevent an abuse of process. There are no allegations and no submissions that there is an abuse of process in the present case.

As a result, the request for an Interim Restoration Order or an Interim Preservation Order must be denied. Nothing in this endorsement precludes the representative from making submissions on these or any other remedies at the scheduled Set Aside hearing on August 4, 2021."

Determinations:

Motion to Void

9. There are two different ways a tenant can void an L1 eviction order for rent arrears. Section 74(4) of the Act states:

“74(4) An eviction order referred to in subsection (3) is void if the tenant pays to the landlord or to the Board, **before the order becomes enforceable**,

(a) the amount of rent that is in arrears under the tenancy agreement;

(b) the amount of additional rent that would have been due under the tenancy agreement as at the date of payment by the tenant had notice of termination not been given;

(c) the amount of NSF cheque charges charged by financial institutions to the landlord in respect of cheques tendered to the landlord by or on behalf of the tenant, as allowed by the Board in an application by the landlord under section 87;

(d) the amount of administration charges payable by the tenant for the NSF cheques, as allowed by the Board in an application by the landlord under section 87; and

(e) the costs ordered by the Board. [emphasis added]”

10. There is no dispute that the Tenant made failed to pay the Landlord all of the ordered arrears and costs by May 31, 2021. Therefore, the Tenant did not void order the Board Order pursuant to section 74(4) of the Act.
11. Section 74(11) of the Act provides a tenant with a further opportunity to void an L1 eviction order for rent arrears by paying all arrears and costs before the order is enforced by the Sheriff:

“74(11) A tenant may make a motion to the Board, on notice to the landlord, to set aside an eviction order referred to in subsection (3) if, after the order becomes enforceable but before it is executed, the tenant pays an amount to the landlord or to the Board and files an affidavit sworn by the tenant stating that the amount, together with any amounts previously paid to the landlord or to the Board, is at least the sum of the following amounts:

1. The amount of rent that is in arrears under the tenancy agreement.
2. The amount of additional rent that would have been due under the tenancy agreement as at the date of payment by the tenant had notice of termination not been given.
3. The amount of NSF cheque charges charged by financial institutions to the landlord in respect of cheques tendered to the landlord by or on behalf of the tenant, as allowed by the Board in an application by the landlord under section 87.
4. The amount of administration charges payable by the tenant for the NSF cheques, as allowed by the Board in an application by the landlord under section 87.
5. The costs ordered by the Board.

Refusal to accept motion

(11.1) The Board shall refuse to accept for filing a motion under subsection (11), if the tenant has not complied with all the requirements of that subsection.

Exception

(12) Subsection (11) does not apply if the tenant has previously made a motion under that subsection during the period of the tenant's tenancy agreement with the landlord.

Motion under subs. (11) stays eviction order

(13) An order under subsection (3) is stayed when a motion under subsection (11) is accepted for filing by the Board and shall not be enforced under this Act or as an order of the Superior Court of Justice during the stay.

(13.1) For greater certainty, subsection (13) applies only if the affidavit filed by the tenant in support of the motion under subsection (11) complies with all the requirements of that subsection.

Order of Board

(14) Subject to subsection (15), if a tenant makes a motion under subsection (11), the Board shall, after a hearing,

(a) make an order declaring the order under subsection (3) to be void, if the tenant has paid the amounts set out in subsection (11); or

(b) make an order lifting the stay of the order under subsection (3), if the tenant has not paid the amounts set out in subsection (11)."

12. From submissions made by both parties at the hearing, I find that the Tenant paid the Landlord a total of \$9,576.76 by June 29, 2021, which is at least the amount required under section 74(11). For the sake of clarity, a related Board file (SOT-15840-20) was disposed of by way of an order issued on March 16, 2021, which directed the Landlord to pay the Tenants \$890.76. (That matter involved three named tenants, one of whom was CB). I am treating that amount as a credit toward June 2021 rent. Further, the Tenant made the payments and filed the motion before the Sheriff enforced the Board Order, and the Tenant has never filed previously filed a motion under s.74(11) during this tenancy

Request to Restore Tenancy

13. TTR submitted that the because the Tenant's motion is successful the Tenant ought to be reinstated into the rental unit. Due the Board's delay in processing the motion, the Board's Notice of Stay that issued on July 2, 2021, arrived too late to stop the eviction on that day. TTR stated the Tenant's eviction was essentially the result of a Board error in allowing the Notice to Vacate to proceed.
14. TTR submitted that yesterday, August 3, 2021, the Tenant tried to regain entry into the rental unit when the Landlord called the police (OPP) to resolve the matter.
15. LLR submitted that the Landlord did not err or abuse any process in exercising his right to enforce eviction in respect of the Board Order (SOL-17392-20). The Sheriff's Notice to Vacate was secured lawfully, so that as of June 15, 2021, the date of eviction had been set for July 2, 2021.

16. On the day of eviction at about 9am, LLR stated the Landlord contacted the Board and was informed by the Board that the eviction could proceed.
17. LLR submitted the Landlord had been under financial pressure to keep up with his mortgage on the building, and was desperate to rent the spaces in the building including the rental unit. LLR stated that around July 2, 2021, the Landlord rented the commercial space to a restaurant lessee, the principals of which also entered into negotiations with the Landlord for the rental unit. LLR submitted the lessee and the Landlord were able to conclude an agreement that has the lessee renting the restaurant/commercial space and two upper units, one of which is the rental unit.
18. WIT called into the hearing from the United States. He testified that he and his partner, Connie Rouble, are the owners of the restaurant (i.e. the lessee for that space) and are also the new tenants of the rental unit.
19. WIT testified that he is currently on vacation in Mississippi until August 12th, when he is scheduled to return home.
20. WIT testified that after June 29, 2021, he entered the rental unit to view it, and he then negotiated its rental with the Landlord. WIT confirmed that before he went on vacation on July 28th, he moved a good part of this Hamilton home into the rental unit, including a couch, a couple of chairs, an ottoman, an end table, a hutch and several boxes of other belongings. He confirmed that his rental unit lease commenced on August 1, 2021, but that the Landlord allowed him to move his belongings prior to that date.
21. WIT testified he has rented the restaurant for \$1,700.00 per month, and the upper two units for \$1,500.00; further, he confirmed he possesses the keys to the rental unit and that he intends to occupy the rental unit as his residence when he returns on August 12th. WIT testified that his partner has given her notice to vacate the Hamilton unit she is living in right now, so that she will move into the rental unit in early September 2021.
22. WIT testified he also owns two other "places", one in Hamilton and the other in St. Williams, and that he plans to rent those units out to residential tenants.
23. WIT said he came to know about the restaurant and building a couple of months ago on www.listing.ca, and it attracted his attention. WIT said that when the prospect of renting the rental unit became a good possibility, he entered into serious negotiations with the Landlord for the rental unit. WIT was unable to give a specific chronology as to when things happened, but he did testify that negotiations on the restaurant were in process for up to six weeks before the prospect of renting the rental unit appeared.
24. LLR addressed the incident on August 3, 2021, when she said the Tenant attempted to change the locks to the rental unit, which was stopped by the intervention of the Landlord who called the OPP to attend.
25. LLR submitted the Landlord has stored the Tenant's belongings so they may be recovered by the Tenant.

26. LLR noted the Board's Notice of Stay only stayed the Board Order, but did not provide any other direction or order that the Landlord had to comply with. LLR submitted that as a result, the Landlord had the legal right to re-rent the rental unit after the eviction of the Tenant had taken place, thereby doing no wrong by renting it to WIT.

Analysis/Final Determinations

27. Based on the testimony and submissions of the parties, I find that on a balance of probabilities that the Landlord did not do anything unlawful or engage in an abuse of process by enforcing eviction under the Board Order (SOL-17392-20), and then re-renting the rental unit to WIT (and his partner).
28. Board Rule A8.2 provides the Landlord and Tenant Board the power to give directions in hearings to prevent any abuse of process. This power is broadly set out in section 23(1) of the *Statutory Powers Procedure Act* (the 'SPPA') which is applicable to the Board.
29. The doctrine of abuse of process may include any action which seriously interferes with or undermines the integrity of a hearing process or which is detrimental to the administration of justice. The authority on the doctrine of abuse of process is found in the Supreme Court of Canada's decision in *Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77* ('Toronto'). At paragraph 35 of Toronto, Justice Arbour describes abuse of process as follows:

"[A]buse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice."

30. In this case, I find that there has been no abuse of process. In my view, the Tenant was afforded adequate procedural protections, and steps as outlined above were taken in this regard. There were no submissions made to suggest the proceedings were oppressive or vexatious at any time.
31. I acknowledge that there was some delay in the Board's processing of the Tenant's motion. The motion was filed after the close of business on June 29, 2021 and the Notice of Stay was issued on the morning of July 2, 2021. I note that July 1, 2021 was a federal statutory holiday. All taken together, this does not represent an inordinate delay, but I agree that it represents a delay nonetheless which resulted in the Tenant's eviction before the stay could be issued.
32. Had the rental unit not been re-rented, reinstatement of the tenancy may have been a possibility at this hearing. However, the Landlord has already entered into a *bona fide* new tenancy with new tenants. The tenancy was negotiated throughout July 2021, but commenced on August 1, 2021, with possession of the rental unit being handed over to the new tenants on that date.

- 33. I accept that the new tenant(s) may not have moved into the rental unit fully even up to the date of this hearing. However, I note the Act does not require that a tenant must actually move into the rental unit under the tenancy agreement in order for the tenancy to commence; rather, a tenant must simply be entitled to occupy the unit. Section 13(1) of the Act states: “*The term or period of a tenancy begins on the day the tenant is entitled to occupy the rental unit under the tenancy agreement.* “
- 34. Taken all together, I find that on a balance of probabilities, the new tenancy with the new tenant(s) commenced on August 1, 2021, and the Landlord gave those new tenant(s) the ability to occupy the unit on August 1, 2021 when he handed over the keys to the unit.
- 35. In my view, the Board is a statutory body that cannot create substantive rights and remedies when there is no clear legislative intent. I note in subsection 31(3) of the Act, which applies in circumstances of an illegal lockout, the Legislature was careful in conferring power on the Board to place a tenant back in possession of a unit only “*if the Board is satisfied that the rental unit is vacant.*” Clearly, the legislation was written to set out the circumstances when a tenant could be placed back in possession of a unit and, as stated, there is nothing in the legislation so allowing when the unit has been re-rented to new tenants.
- 36. In the motion-to-void as filed, the only remedy sought by the Tenant is an order reinstating the Tenant in the rental unit. I am unable to grant this remedy because of the new tenancy already in place. Pursuant to subsection 37(1) of the Act, once a tenancy has been put in place, it can only be terminated in accordance with the Act. As such, I have no jurisdiction hereunder to grant the remedy being sought by the Tenant to evict the new tenants under their new tenancy so the Tenant may be reinstated.
- 37. I note TTR’s cited Board interim order TEL-12137-20 issued July 12, 2021, but that case is not applicable here because the rental unit in that case was still empty after the eviction had been enforced, which was due to a Board’s delay in processing the tenant’s review request.

It is ordered that:

- 1. By eviction, the tenancy between the Landlord and Tenant terminated on July 2, 2021.
- 2. The Landlord’s request for an order to reinstate the Tenant in the rental unit is dismissed.



Alex Brkic
Member, Landlord and Tenant Board

October 14, 2021
Date Issued

Southern-RO
119 King Street West, 6th Floor
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If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.