



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

Citation: Reed v Rosen, 2024 ONLTB 21769

Date: 2024-03-28

File Number: LTB-L-070858-22-VO-SA

In the matter of: 1206, 29 QUEENS QUAY E
TORONTO ON M5E0A4

Between: Wendy Reed Landlord

And

David Rosen Tenant

2024 ONLTB 21769 (CanLII)

David Rosen (the 'Tenant') filed a motion to set aside order LTB-L-070858-22 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 March 6, 2024.

The Landlord's Legal Representative, T. Duggan, the Landlord, the Tenant's Legal Representative, M. Yarmus, and the Tenant attended the hearing.

Determinations:

1. The Tenant's motion to void filed on January 22, 2024 pursuant to subsection 74(11) of Act was directed to hearing to confirm whether the payments were received, determine whether the Landlord incurred enforcement costs, and to determine whether the Tenant has previously made this type of motion during the tenancy.
2. The Landlord's Legal Representative submitted that the Tenant's motion should be dismissed because of the following:
 - a) This is not the Tenant's first motion to void filed pursuant to subsection 74(11) of the Act; and/or
 - b) The amount paid by the Tenant was not sufficient to void the order.
3. For the following reasons, the Tenant's motion to void is dismissed and the stay of Order LTB-L-070858-22 issued March 9, 2023 is lifted.

Relevant sections of the Act

4. Subsection 74(11) of the Act states:
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.

5. Subsection 74(11.1) of the Act states:

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.

6. Subsection 74(12) of the Act states:

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.

7. Subsection 74(14) of the Act states:

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).

Whether the Tenant had previously made this type of Motion

8. The Landlord's Legal Representative submits that the Tenant previously filed a motion to void pursuant to subsection 74(11) of the Act on January 19, 2024 which was refused by the Board in Member Brown's Endorsement dated January 19, 2024. He submits that it is

not necessary for a Motion pursuant to subsection 74(11) to be heard on its merit in order to count.

9. The Landlord's Legal Representative submitted that a refusal pursuant to subsection 74(12) of the Act can only be triggered when a motion is made pursuant to subsection 74(11) of the Act. In support of his assertion, the Landlord's Legal Representative relied upon TEL-01844-19-VO/RV issued on August 20, 2019 wherein Vice Chair Carey states at paragraph 3 the following:

“As can be seen from s. 74(12), the one time right tenants have to void an order after the enforcement date is tied to the filing of a motion with the Board.”

10. The Landlord's Legal Representative submits that as per the above finding in order TEL-01844-19-VO/RV it is the filing of the motion, not the adjudication of it, that triggers subsection 74(12) of the Act. He submits that if the Legislature intended that 74(12) would only apply when there had been an adjudication on a previous motion pursuant to subsection 74(11) of the Act, then it would have said so, having not said so, then as per Vice Chair Carey's finding, the Legislature intended that the making of the motion for the purposes of 74(11) is triggered when the Motion is filed with the Board.
11. The Tenant's Legal Representative submitted that order TEL-01844-VO/RV issued on May 20, 2029 went on to find at paragraph 6 that it was a first motion, so the decision in that case was not to refuse a second motion. He also submitted that the Board refused the Tenant's motion that which was filed on Friday as Member Brown stated that he needed proof that the last payment had actually cleared, so on Monday the Tenant filed proof that the money cleared.
12. The Tenant's Legal Representative submitted that there was a technical requirement lacking with the Motion filed on January 19, 2024, such as when an application is dismissed because of a defective Notice. He submitted in those circumstances a landlord can still refile. The Tenant's Legal Representative submitted that the Board had the ability to refuse this motion if it considered it the second Motion and chose not to do so, instead the Board sent it to a hearing. Therefore, he submits that the Motion is properly before the Board.
13. Based on the submissions before me, I am satisfied that The Tenant has not previously made a motion under subsection 74(11) of the Act to set aside an eviction order during this tenancy. In Vice Chair Carey's order TEL-01844-19-VO/RV issued on August 20, 2019, the main point is to encourage parties to file this type of Motion and not privately negotiate after an enforcement date in an order if a tenant pays in full.
14. Member Brown's direction dated January 19, 2024 refused the Tenant's Motion to Void pursuant to subsection 74(11) of the Act in accordance with 74(11.1) of the Act. That subsection states that “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 (my emphasis).
15. The Landlord's Legal Representative argued that it was the filing of the Motion that triggered subsection 74(12) of the Act. However, given the plain wording of subsection 74(11.1) of the Act, I find that the Tenant's Motion dated January 19, 2024 was not accepted

for filing by the Board. Consequently, if the Motion was not filed with the Board, then it does not count.

Confirmation of Payments Received

16. As per the Tenant's Declaration, \$172,441.00 was paid to the Landlord between April 3, 2023 and January 22, 2024. There is no dispute that the rent is due on the 16th day of each month.
17. Order LTB-L-070858-22 issued March 9, 2023 ordered the Tenant to pay rent arrears of \$60,000.00 and Board costs of \$186.00 for a total of \$60,186.00 owing to March 15, 2023.
18. The Landlord acknowledged that the amounts stated in the Tenant's Declaration were received. However, the Landlord's Legal Representative submitted that these amounts do not satisfy the provisions of subsection 74(11) of the Act for the following reasons: the rent increase amount effective February 16, 2023 was not included, and that the Landlord was entitled to allocate the Tenant's payments, in particular, to outstanding electrical bills, and Divisional Court costs and interest ordered to be paid by the Tenant to the Landlord subsequent to the Order. A determination of the latter submission was not necessary given the finding below.

Rent Increase

19. Based on the evidence before me, I was satisfied that the Landlord provided a lawful Notice of Rent Increase (N1) deemed served on the Tenant on November 7, 2022 that increased the rent to \$10,250.00 effective February 16, 2023. A copy of the N1 and certificate of service was provided into evidence. However, there was no dispute that the increased amount of \$250.00 as of February 16, 2023 was not included in the calculation of the arrears owing to March 15, 2023 pursuant to order LTB-L-070858-22 issued March 9, 2023.
20. The Tenant's Legal Representative submitted that section 74(11) of the Act is clear on what amounts are to be paid, the arrears ordered, plus the accruing monthly rents, and any costs ordered by the Board. He also submitted that the Landlord ought to have requested a Review of Order LTB-L-070858-22 issued March 9, 2023 when the rent increase for February 16, 2023 was not included in the determination of the rent arrears owing to March 15, 2023.
21. The Landlord's Legal Representative submits that subsection 74(11) of the Act requires that the Tenant pay an amount to the landlord that is at least the sum of the following amounts: the amount of rent that is in arrears under the tenancy agreement, and 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.
22. The Landlord's Legal Representative submits that the amount of the rent increase effective February 16, 2023 must be considered as additional rent that would have been due under the tenancy agreement since the N1 was deemed valid.
23. Based on the submissions before me, I am not satisfied that the rent increase for February 16, 2023 of \$250.00 is considered additional rent that would have been due under the tenancy agreement. I am satisfied that it would be considered arrears given that the order

calculated the rent owing to March 15, 2023. The calculation of additional rent commences after March 15, 2023.

24. Subsection 74(11) of the Act references the amount of rent that is in arrears under the tenancy agreement and the amount of additional rent that would have been due under the tenancy agreement had notice of termination not been given. I interpret the first amount referred to in subsection 74(11) of the Act as being the amount of arrears owing pursuant to the order of the Board, and the second amount being any new rent that has come due and owing since the arrears ordered by the Board.
25. There has to be a starting point to calculate these amounts and it just makes sense that it begins with the amount ordered by the Board. The Board order determined the amount of rent arrears owing under the tenancy agreement to March 15, 2023. And it flows that the second amount for calculation in subsection 74(11) of the Act refers to any additional rent due and owing under the tenancy agreement since that period. To interpret otherwise would be absurd as it would require an additional finding on the rent arrears owing.
26. Consequently, I was satisfied that the rent increase amount of \$250.00 for February 16, 2023 is not additional rent owing. I find that the rent increase effective February 16, 2023 ought to have been contemplated at the hearing of this matter on February 1, 2023. If this amount was not included in the order dated March 9, 2023 which calculated the rent arrears owing to March 15, 2023, then the Landlord's remedy was to request a Review of that Order.
27. However, I am satisfied that the rental increase of \$250.00 each month is applicable from March 16, 2023 onward in the calculation of any additional rent that would be due under the tenancy agreement pursuant to subsection 74(11) of the Act.

Whether the Tenant's payments satisfied the Order

28. The Tenant's Legal Representative submitted that Member Brown's direction dated January 22, 2024 found that the Tenant has made the payments required by subsection 74(11) of the Act.
29. Member Brown's direction states the following:

The Tenant filed a motion to void the above order under subsection 74(11) of the Residential Tenancies Act, 2006, based on payments that were made after the order became enforceable.

Based on the information provided by the Tenant, it appears that the Tenant has made the payments required by subsection 74(11).

The motion is directed to a hearing to confirm whether the payments were received, determine whether the Landlord incurred enforcement costs and to determine whether the Tenant has previously made this type of motion during the tenancy.
30. Given the wording of Member Brown's direction, in particular "based on the information provided by the Tenant, it appears..." I am not satisfied that a finding was made. Member Brown simply stated that it "appears" the Tenant has made the payments, however he directed this matter to a hearing. Once at a hearing, it is up to the hearing member to

determine if subsection 74(11) of the Act was satisfied after hearing both the Landlord and the Tenant's evidence and submissions related to the payments made by the Tenant. Especially given the time that has lapsed from the date of the Order to the filing of the Motion to Void, whether or not any new rent changed/increased is a relevant factor that is not disclosed in the Tenant's Motion materials.

31. Order LTB-L-070858-22 issued March 9, 2023 ordered the Tenant to pay the arrears owing to March 15, 2023 of \$60,000.00 and Board costs of \$186.00 totalling \$60,186.00.
32. The Tenant's last payment as per his declaration filed with this Motion to Void was January 22, 2024. The additional rent that would have come due and owing by the Tenant under the tenancy agreement, until the date of payment by the Tenant, is the period of March 16, 2023 to February 15, 2024, a total of eleven (11) months. Consequently, the additional rent owed by the Tenant under the tenancy agreement is \$112,750.00 (\$10,250.00 x 11 months).
33. Therefore, I find that the total amount required to be paid by the Tenant to void LTB-L-070858-22 issued March 9, 2023 pursuant to subsection 74(11) of the Act is \$172,936.00 (\$60,186.00 + \$112,750.00). The total amount paid by the Tenant according to his declaration and received by the Landlord, is \$172,441.00 which less than the required amount to be paid (\$172,936.00 - \$172,441.00 = \$495.00).
34. Consequently, I find that the Tenant did not pay at least the amount required under subsection 74(11) of the Act to void the eviction order. Therefore, this motion must be dismissed.
35. Subsection 74(14) of the Act provides that if the Tenant has not paid the amounts set out in subsection (11), I must make an order lifting the stay of Order LTB-L-070858-22 issued March 9, 2023.

It is ordered that:

1. The motion to void order LTB-L-070858-22 issued on March 9, 2023, is dismissed.
2. The stay of order LTB-L-070858-22 issued on March 9, 2023 is lifted.

March 28, 2024
Date Issued

 Lisa Del Vecchio
 Member, Landlord and Tenant Board

15 Grosvenor Street, Ground 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.