



Order under Section 78(11) Residential Tenancies Act, 2006

Citation: Payne v Spears, 2024 ONLTB 16558

Date: 2024-03-07

File Number: LTB-L-100368-23-SA

In the matter of: 1, 15 OTTAWA STREET EAST HAVELOCK
ON K0L1Z0

Between: Brian Payne Landlord

And

Jasmine Spears Tenant

Brian Payne (the 'Landlord') applied for an order to terminate the tenancy and evict Jasmine Spears (the 'Tenant') and for an order to have the Tenant pay the rent they owe because the Tenant did not meet a condition specified in the order issued by the LTB on October 5, 2023 with respect to application LTB-L-035151-23.

The Landlord's application was resolved by order LTB-L-100368-23, issued on January 10, 2024. This order was issued without a hearing being held.

On January 15, 2024, the Tenant filed a motion to set aside order LTB-L-100368-23.

This motion was heard by videoconference on February 26, 2024.

The Tenant, the Landlord and the Landlord's Legal Representative Donna M. Wood attended the hearing.

Determinations:

1. This motion is before the Board because the Landlord obtained the eviction order without notice to the Tenants under s.78 of the Residential Tenancies Act, 2006 ("the Act") based upon an allegation that the Tenant breached the original order. The Tenant does not want to be evicted and asks that the eviction order be set aside.

2. At the hearing, the Tenant acknowledged they breached order LTB-L-035151-23 by failing to pay the Landlord the monthly rent on or before December 1, 2023. The Tenant also conceded she breached the order by failing to pay the Landlord \$200.00 towards the rent arrears on or before December 14, 2023.
3. The only issues before me are:
 - a) whether or not, pursuant to s.78(11)(b) of the Residential Tenancies Act, 2006 (“the Act”) having regard to all of the circumstances, it would not be unfair to set aside order LTB-L-100368-23, issued on January 10, 2024.
 - b) if the answer to a) is no; when the stay imposed on the Order LTB-L-100368-23 should be lifted - immediately or on a future date.
4. Pursuant to subsection 78(11)(b) of the Act, the Board may make an order setting aside the original order if the Board is satisfied that having regard to all of the circumstances, that it would not be unfair to set aside the order.
5. Pursuant to this provision, I have the discretion to grant relief to the Tenants by setting aside the original order notwithstanding that the Tenants have breached conditions required in it.

Tenant's Evidence

6. The Tenant testified she was off work for two weeks with Covid-19 in the middle of October 2023 and was unable to make the required payments to the Landlord in December of 2023. I asked the Tenant why a two-week illness in October 2023 would affect her payments due in December 2023 and she replied that she was actually ill in mid November 2023 not October.
7. The Tenant's evidence was she paid the rent arrears that were due on December 14, 2023 on December 15, 2023. She has not paid the Landlord the rent arrears that were due on January 14, 2024 or the arrears that were due on February 14, 2024. The Tenant acknowledged she has not paid the monthly rent for February 2024. When asked why this was, the Tenant stated was waiting for the outcome of this motion hearing before making further payments.
8. The Tenant stated her current monthly income is \$1,600.00. The monthly rent is \$1,000.00. Her evidence was she works part time as a personal support worker and works approximately 30 hours per week. The Tenant acknowledged she has other monthly expenses such as a car payment and fuel costs.
9. The Tenant testified that over the noon hour on the hearing date she learned she would now be working full time hours. When asked if she had any evidence to show she would

now be working full time hours, she stated she did not. I note the file was called at 4:00 p.m. and the Tenant had several hours to obtain some confirmation of her change in employment.

10. The Tenant stated she does not have any money in her bank account but has \$1,500.00 in cash on hand. The Tenant sought an order granting her motion and a conditional order with the same payment terms as contained in order LTB-L-035151-23.

Landlord's Evidence

11. The Landlord testified that the outstanding rent arrears as of the hearing date are \$10,201.00. The Tenant did not dispute this evidence. The arrears owing pursuant to Board order LTB-L-035151-23 were \$10,901.00.
12. The Landlord is a small landlord. His evidence was the lack of payments from the Tenant and the accumulated rent arrears have caused him stress since he has his own life costs to pay. He testified he has struggled to pay his own mortgage due to the Tenant's failure to pay the monthly rent and the arrears of rent.
13. The Landlord was opposed to a new conditional order since he does not believe the Tenant would make the required payments. He stated he would continue to worry about when and if payments would be made.

Discretionary Relief Under s.78(11)(b)

14. I have considered all of the submissions and evidence presented. Section 78(11)(b) of the Act provides discretion to set aside an order where to do so would not be unfair.
15. I am not satisfied that setting aside the order in this case would not be unfair to the Landlord having regard to the circumstances of this case. Based on the evidence presented, I was not convinced the Tenant could afford the monthly rent and a reasonable payment towards the rent arrears. The Tenant submitted no evidence supporting the income she claimed and no evidence showing this amount would increase. As such, I am not convinced a conditional order is appropriate in this case.
16. Additionally, the Tenant could have made a payment to the Landlord prior to the hearing but chose not to. Such a payment would have supported a finding of a good faith intention on the part of the Tenant to preserve the tenancy.
17. The Tenant has a tenancy agreement with the Landlord to pay the monthly rent. The Tenant also has an order from the Board that she agreed to, requiring her to make payments to the Landlord. Board orders are not suggestions. The Tenant could have complied with order LTB-L-035151-23 as best she could taking into account her two-week illness. Instead, the Tenant chose to wait for the outcome of this hearing before deciding

whether to pay any money to the Landlord. As such, I have no confidence the Tenant would abide by a new conditional order.

18. For all of these reasons, I find it would be unduly prejudicial and unfair to the Landlord to set aside order LTB-L-100368-23 and permit the tenancy to continue. Therefore, the Tenant's motion is denied.

Discretionary Relief under s. 78(11)(c)

19. The Tenant requested the Board lift the stay of order LTB-L-100368-23 at the end of April 2024. The Tenant lives alone and suffers from mental health issues. She stated she would need time to find alternate living arrangements because there is little available in her price range.
20. I find the Tenant has had sufficient time to find another place to live. This motion was filed over one month prior to the hearing date. The Tenant's own evidence was she waiting for the outcome of this hearing. In so doing, the Tenant should have taken some of this time to find potential living arrangements elsewhere. For these reasons, I am not satisfied a delay in lifting the stay of order LTB-L-100368-23 is appropriate.
21. The stay of order LTB-L-100368-23 is lifted immediately.

It is ordered that:

1. The Tenant's motion to set aside Order LTB-L-100368-23, issued on January 10, 2024, is denied.
2. The stay of order LTB-L-100368-23 is lifted immediately.
3. Order LTB-L-100368-23 is unchanged.

March 7, 2024

Date Issued

John Cashmore

Member, Landlord and Tenant Board

15 Grosvenor Street, Ground Floor Toronto
ON M7A 2G6

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

