



**Order under Section 69
Residential Tenancies Act, 2006**

Citation: Seto v Harper, 2023 ONLTB 79839

Date: 2023-12-11

File Number: LTB-L-010572-23

In the matter of: A, 838 RIVER RD
BRAESIDE ON K0A1G0

Between: Jo-ane Seto Landlord

And

Mike Harper Tenant

Jo-ane Seto (the 'Landlord') applied for an order to terminate the tenancy and evict Mike Harper (the 'Tenant') because:

- the Tenant has been persistently late in paying the Tenant's rent.

The Landlord also claimed compensation for each day the Tenant remained in the unit after the termination date.

This application was heard by videoconference on October 3, 2023.

Only the Landlord's Legal Representative Sandy Azevado and the Landlord attended the hearing.

As of 9:43 a.m., the Tenant was not present or represented at the hearing although properly served with notice of this hearing by the LTB. There was no record of a request to adjourn the hearing. As a result, the hearing proceeded with only the Landlord's evidence.

Determinations:

Does the Act apply?

1. There is a preliminary issue to be determined in this matter, which is whether this is a residential tenancy and whether the *Residential Tenancies Act, 2006* (the "Act") applies.

2. Landlord's Legal Representative submitted that the Act does not apply to the rental unit as the zoning is commercial. If it is a commercial tenancy, then the Act does not apply, and the Board does not have jurisdiction over the tenancy.
3. The Landlord purchased the property in April 2022. The property consists of a 2-storey house on one side with an attached main floor unit with a store front. The complex consists of 2 units, Unit A (the main floor/store front section) and Unit B (the 2-storey section).
4. The Landlord testified that when she purchased the rental complex, the Tenant had been residing in Unit A since January 2020, and she was unaware that the unit was zoned for commercial, and not residential, purposes. That unit is at the back of the store front, and the store is empty.
5. The Landlord submitted into evidence a letter from The Corporation of the Township of McNab/Braeside dated April 5, 2022 that the property is zoned as "Hamlet Commercial" with the corresponding By-Law no 2021-49.
6. The 2023 Township Tax Bill entered into evidence shows both a commercial and a residential unit at the address. Hydro One electricity bills submitted into evidence dated May 12, 2022 show two different accounts (Unit A – business, Unit B – residential).
7. The Landlord submitted that it makes sense that the portion of the property which has the store front (where the Tenant resides) would be the commercial unit.

Analysis

8. In order for the Act to apply there must be a tenancy agreement between a "landlord" and a "tenant" respecting a "rental unit" or "residential premises", as those terms are defined in the Act. The exemptions from the Act found in section 5 must also be considered.
9. The following sections of the *Residential Tenancies Act, 2006* (the "Act") are relevant:

2(1) "landlord" includes,

(a) the owner of a rental unit or any other person who permits occupancy of a rental unit, other than a tenant who occupies a rental unit in a residential complex and who permits another person to also occupy the unit or any part of the unit ...

"tenant" includes: a person who pays rent in return for the right to occupy a rental unit ...

"rental unit" means any living accommodation used or intended for use as rented residential premises, and "rental unit" includes,

(a) a site for a mobile home or site on which there is a land lease home used or intended for use as rented residential premises, and

- (b) a room in a boarding house, rooming house or lodging house and a unit in a care home... [emphasis added]

“residential unit” means any living accommodation used or intended for use as residential premise, and “residential unit” includes,

- (a) a site for a mobile home or on which there is a land lease home used or intended for use as a residential premises, and
- (b) a room in a boarding house, rooming house or lodging house and a unit in a care home... [emphasis added]

5 (h) living accommodation located in a building or project used in whole or in part for non-residential purposes if the occupancy of the living accommodation is conditional upon the occupant continuing to be an employee of or perform services related to a business or enterprise carried out in the building or project;

(j) premises occupied for business or agricultural purposes with living accommodation attached if the occupancy for both purposes is under a single lease and the same person occupies the premises and the living accommodation

202: In making findings on an application, the Board shall ascertain the real substance of all transactions and activities relating to a residential complex or a rental unit and the good faith of the participants and in doing so,

- (a) may disregard the outward form of a transaction or the separate corporate existence of participants; and
- (b) may have regard to the pattern of activities relating to the residential complex or the rental unit.

10. There is no dispute that Jo-ane Seto is the owner of the rental unit and therefore meets the definition of “landlord” in the Act.
11. There is no dispute that Mike Harper is a person who pays rent in return for the right to occupy a rental unit and therefore meets the definition of “tenant” in the Act.
12. Unit A is zoned for commercial use, but that is not necessarily determinative of whether it meets the definition of “rental unit”. The rental unit is being used exclusively by the Tenant as a rented residential premises, a fact that was known by the Landlord. The Landlord testified that she knew that the Tenant resided in the unit when she purchased the property.
13. In *Re Hahn et al. and Kramer*, 1979 CanLII 2111 (ON SC), the Court found that the business purpose must predominate in order to find that a tenancy is commercial. In this case, the commercial component is empty, and no business is being carried on.

14. Because the unit is not being used for business purposes, the exemptions in the Act under sections 5(h) and (j) do not apply.
15. The fact that municipal zoning only permits commercial usage does not oust the jurisdiction of the Act. Pursuant to section 3(4) of the Act, if a provision of the RTA conflicts with a provision of another Act, other than the *Human Rights Code*, the provision of the RTA applies.
16. The “real substance” of the relationship between the parties is that Unit A is used as a residence by the Tenant, with the knowledge and consent of the Landlord. Therefore, the Act applies to the tenancy between the parties.

N8 Notice of Termination – persistently late

17. On January 28, 2023, the Landlord gave the Tenant an N8 notice of termination. The notice of termination contains the following allegations: rent was paid late or not at all 7 times in the 8 months between April 1, 2022 and December 1, 2022.
18. The Tenant has persistently failed to pay the rent on the date it was due. The rent is due on the 1st day of each month:

April 1, 2022:	April 12 & 13
May 1:	May 1 & 20
June 1:	June 1 & 2
August 1:	August 1, 2, 9
Sept 1:	Sept 7 & 30
Oct 1:	Oct 1 partial
Nov 1:	none
Dec 1, 2022:	\$3,000, early for Jan 2023
19. It was the Landlord’s uncontested evidence that subsequently no payments were received until an \$800.00 payment on September 21, 2023 despite the Landlord’s reminders and service of N4 notices. She stated that the Tenant either did not respond or said that he was self-employed, waiting for money, and that he would pay.
20. The Tenant was required to pay the Landlord \$7,338.08 in daily compensation for use and occupation of the rental unit for the period from April 1, 2023 to October 3, 2023.
21. Based on the Monthly rent, the daily compensation is \$39.45. This amount is calculated as follows: \$1,200.00 x 12, divided by 365 days.
22. The Landlord incurred costs of \$186.00 for filing the application and is entitled to reimbursement of those costs.
23. There is no last month's rent deposit.

Relief from eviction

24. Because the Tenant did not attend the hearing, I do not have benefit of his submissions when considering circumstances under subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act') to delay or deny eviction and find that it would be unfair to grant relief from eviction pursuant to subsection 83(1) of the Act.
25. I find, however, due to the holiday season, that it would not be unfair to postpone the eviction until January 15, 2024 pursuant to subsection 83(1)(b) of the Act.

It is ordered that:

1. The tenancy between the Landlord and the Tenant is terminated. The Tenant must move out of the rental unit on or before January 15, 2024.
2. If the unit is not vacated on or before January 15, 2024, then starting January 16, 2024, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
3. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlord on or after January 16, 2024.
4. The Tenant shall pay to the Landlord \$7,338.08, which represents compensation for the use of the unit from April 1, 2023 to October 3, 2023 (less any rent payments made during this period).
5. The Tenant shall also pay the Landlord compensation of \$39.45 per day for the use of the unit starting October 4, 2023 until the date the Tenant moves out of the unit.
6. The Tenant shall also pay to the Landlord \$186.00 for the cost of filing the application.
7. The total amount the Tenant owes the Landlord is \$7,524.08 (less any rent payments made during this period).
8. If the Tenant does not pay the Landlord the full amount owing on or before January 15, 2024, the Tenant will start to owe interest. This will be simple interest calculated from January 16, 2024 at 7.00% annually on the balance outstanding.

December 11, 2023

Date Issued

Margo den Haan

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.

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In accordance with section 81 of the Act, the part of this order relating to the eviction of the Tenant expires on July 16, 2024 if the order has not been filed on or before this date with the Court Enforcement Office (Sheriff) that has territorial jurisdiction where the rental unit is located.

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