



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

Citation: Aliassa v O'Hara, 2023 ONLTB 71952

Date: 2023-11-29

File Number: LTB-L-021065-23

In the matter of: 78 DONWOODS DR.
NORTH YORK ON M4N2G5

Between: Mark Aliassa Landlord

and

Timothy O'Hara Tenants
Jennifer Hroncich

Mark Aliassa (the 'Landlord') applied for an order to terminate the tenancy and evict Timothy O'hara and Jennifer Hroncich (the 'Tenants') because:

- the Tenants have been persistently late in paying the Tenants' rent.

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

This application was heard by videoconference on October 19, 2023.

The Landlord's Legal Representative, Howard Levenson, the Landlord, and the Tenant, Timothy O'Hara, on behalf of both Tenants, attended the hearing. The Tenant spoke with Duty Counsel prior to the start of the proceeding.

Determinations:

1. For the reasons set out below we find the Landlord has not proven on a balance of probabilities that the Tenants have persistently paid their rent late. As a result, the application is dismissed.
2. The Tenants were in possession of the rental unit on the date the application was filed.

Preliminary Issue

3. At the outset of the hearing the Tenant requested an adjournment so that this application could be heard with the Landlord's L1 Application for non-payment of rent, where he intended to raise issues under s. 82 of the *Residential Tenancies Act, 2006* (the Act') regarding alleged maintenance work he has performed on the rental unit.
4. In the alternative, the Tenant confirmed he was also prepared to proceed with both applications at this hearing.
5. The Landlord objected both to the Tenant's adjournment request and to hearing the L1 Application at this hearing.
6. With respect to hearing the L1 and L2 Applications together, as recently articulated by the Divisional Court in *Tataw v Minto Apartment LP*, 2023 ONSC 4238, there can be factual overlap on an L1 application for non-payment of rent and an L2 Application for persistent late payment. However, these related issues are distinct. Further, we note there is no right on an L2 Application for a Tenant to raise issues under s. 82.
7. Common considerations on applications may arise under s. 83 of the Act. Nonetheless, determinations whether there are serious and ongoing breaches of obligations at the time of hearing are specific to when an application is heard and, in any event, may not be equivalent to determinations on the merits of issues raised under s. 82. As a result, while there may be some overlapping evidence we do not find there are overlapping issues.
8. The L1 application is scheduled for February 28, 2023. The notice for today's hearing was to the L2 Application and hearing of the L1 Application would also have entailed hearing the Tenant's issues under s. 82 – which we infer would have required additional time to prepare. As a result, we find the Landlord's objection to proceeding with the L1 Application was not unreasonable.
9. The Tenant's submissions were directed towards resolving all issues between the parties holistically and were not related to an inability to proceed with either application at this hearing.

10. In the above circumstances, we were not satisfied an adequate hearing could not be held on the L2 Application nor that it was fair to join two applications which we find did not have overlapping issues and would have resulted in delay.
11. As a result, we denied the Tenant's requests for an adjournment and for the L1 and L2 Applications to be heard together.

Persistent Late Payment

12. On February 14, 2023, the Landlord gave the Tenants a N8 notice of termination. The N8 Notice alleges rent is due on the 1st of the month and that the Tenant persistently paid rent late during the period from December 1, 2021 until February 1, 2023.
13. In particular, the N8 Notice alleges rent for December 2021 and January 2022 was paid on January 20, 2022, that rent for April 2022 was paid on April 10, 2022, that rent for July, and August 2022 was paid on September 1, 2022, and that no rent was paid for October 2022 through to and including February 2023.
14. The Landlord confirmed the above dates of payment and admitted rent was paid on time for the five months of February, March, May, June, and September 2022.
15. Since service of the N8 Notice, the Landlord testified rent had also been paid on time for August 2023 and a payment of \$3,000.00 towards rent was paid on September 1, 2023; but, no other or further payments had been made.
16. The Tenant did not dispute the dates he paid rent were accurate; however, he submitted he communicated with the Landlord when rent would be paid at different times and the Landlord agreed he could pay rent late. This was disputed by the Landlord.

Did the Landlord Consent to Late Rent Payments?

17. The Landlord testified rent is due on the 1st of the month as provided for in the lease agreement and that there have never been any written agreements or amendments to this term of the lease.
18. The Tenant submitted he understood they had an ongoing dialogue and verbal agreement regarding payment of rent.
19. The Tenant testified he would email or text the Landlord about paying rent late and the Landlord would respond with a simple 'yes' or 'sure'.
20. The Landlord testified throughout the tenancy the Tenants usually paid their rent late. He testified the Tenants would email or text him the day rent was due, or the day before it was due, that they would be late and asked for extensions of varying lengths of time. The Landlord testified this would go on for months and then the Tenants would make a lump sum payment that covered multiple months of rent.

21. This was not disputed by the Tenant and, in fact, the Tenant suggested that the Landlord's acceptance of his late payments supported finding they had an agreement.
22. The Landlord testified he emailed the Tenants numerous times asking that they pay their rent on time. However, the Landlord also admitted when the Tenants specifically asked him if they could pay rent late for a month he would agree and respond affirmatively and further stated that every month was the same.
23. The Landlord testified he trusted the Tenants and that it was only after a number of months of unpaid rent in a row that he reached a breaking point.
24. While the Landlord testified he had previously retained counsel who served notices on the Tenants; there were no details provided about what these notices alleged or when they were served. The Tenant testified the first time he was served an N4 Notice was the same time that the N8 Notice was served.

Analysis

25. The Landlord admitted he agreed to accept late payments on a month by month basis from the Tenants for many years and that it was only after a substantial period of non-payment of rent by the Tenants that he lost patience.
26. While we accept and find the parties did not enter into a formal agreement to change the date rent was to be paid under the lease, we find the Landlord agreed to payments of rent on dates other than the first of the month and further engaged in a course of conduct that made it reasonable for the Tenants to expect that rent would not be considered late when not paid on the first of the month.
27. We find this to be the case even where rent was not paid for months at a time, as the Landlord admitted he consented to the Tenants' proposed delayed timelines for payment for months at a time and did so repeatedly for almost a decade.
28. We further find the Landlord has not demonstrated he made the Tenants aware he did not agree to their pattern of late payments prior to the service of the N8 Notice. We find the Landlord's submission he felt he had no option but to agree and accept late payment does not equate to him advising the Tenants late payment was not acceptable. The Landlord's evidence was clear – when the Tenants asked him, he told the Tenants they could pay rent late.
29. Based on the above, we find it more likely than not that the Landlord acquiesced to late payment until the service of the N8 Notice.
30. As a result, we find the Landlord has not proven the Tenants persistently paid rent late and the Landlord's application must be dismissed.

It is ordered that:

1. The Landlord's application is dismissed.

November 29, 2023

Date Issued

Rebecca Case

Vice Chair, Landlord and Tenant Board

Melissa Anjema

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.