



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

**Citation:** Avy Enterprises Inc. v Clayton, 2023 ONLTB 75922

**Date:** 2023-11-22 **File Number:**  
LTB-L-065105-23-SA

**In the matter of:** 2307, 115 BLUE JAYS WAY TORONTO  
ON M5V0N4

**Between:** Avy Enterprises Inc . Landlord

**And**

Nathaniel Clayton Tenant

Avy Enterprises Inc. (the 'Landlord') applied for an order to terminate the tenancy and evict Nathaniel Clayton (the 'Tenant') and for an order to have the Tenant pay the rent they owe because the Tenant failed to meet a condition specified in the order issued by the Board on August 18, 2023 with respect to application LTB-L-050650-22.

The Landlord's application was resolved by Board order LTB-L-065105-23, issued on September 25, 2023. The Tenant filed a motion to set aside order LTB-L-065105-23 on September 28, 2023.

The motion was heard by videoconference on November 9, 2023.

The Landlord's Legal Representative Samila Waslat and the Tenant Nathaniel Clayton attended the hearing.

### **Determinations:**

1. This motion is before the Board because the Landlord obtained the eviction order without notice to the Tenant 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. Preliminary Issue

2. I pointed out to the Tenant his motion to set aside Board order LTB-L-065105-23 names Yogi Verma as the Landlord and not Avy Enterprises Inc. After submissions from the parties it was clear that Avy Enterprises Inc. is the Landlord and that Yogi Verma is an employee of the Landlord whom the Tenant has dealt with. I was satisfied the Tenant did not understand the relationship between Yogi Verma and Avy Enterprises Inc. at the time his motion was filed.
3. The Tenant was not disputing who the Landlord was. At the hearing, I asked him if he wanted to amend his motion to name Avy Enterprises Inc. as the Landlord and he confirmed he did. The Landlord was opposed to the amendment and sought an order denying the Tenant's motion.
4. I asked the Landlord what prejudice an amendment to the motion would cause them given they were fully aware of the issues being raised. The Landlord submitted the ongoing proceedings themselves were prejudicial to them. I did not find this amounted to prejudice caused by amending the name of the Landlord on the Tenant's motion. Order LTB-L-065105-23 clearly names the Landlord. Yogi Verma is an employee of the Landlord. No new issues would arise if the amendment was granted. I did not find it would be fair to the Tenant to deny his motion because he did not understand the nature of the relationship between Avy Enterprises Inc. and Yogi Verma at the time he filed his motion. As such, I allowed the amendment and the Tenant's motion was heard. Motion to Set Aside
5. At the hearing, the Tenant conceded he breached the ordered settlement by failing to pay \$375.00 towards the rent arrears on or before August 15, 2023. It was agreed by the parties this payment was made to the Landlord on August 17, 2023.
6. Since the Tenant acknowledged he breached order LTB-L-050650-22, 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-065105-23, issued on September 25, 2023.
  - b) if the answer to a) is no; when the stay imposed on the Order LTB-L-065105-23 should be lifted - immediately or on a future date.
7. Pursuant to subsection 78(11)(b) of the Act, the Board may make an order setting aside the 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.
8. Pursuant to this provision, I have the discretion to grant relief to the Tenant by setting aside the order notwithstanding that the Tenant has breached conditions required in it.

Tenant's Position

9. The Tenant testified that August 15, 2023 is his birthday. This is the date the arrears payment of \$375.00 was due. The Tenant's evidence was he was out of the country on his birthday and candidly admitted he forgot to make the payment. He testified when he realized he missed the payment due date, he texted Yogi Verma on August 16, 2023 to advise him of what had happened. The Tenant made the required payment on August 17, 2023.
10. The Tenant's evidence was all the other payments required by order LTB-L-050650-22 to the date of the hearing have been made. There are no payments that have come due and owing that the Tenant has yet to pay.
11. The Tenant lives alone and works in the fire protection industry. I heard no evidence the Tenant could not afford the monthly rent or the ongoing arrears payments required by order LTB-L-050650-22. The Tenant stated he could abide by the remaining terms of order LTB-L-050650-22.

Landlord's Position

12. The Landlord acknowledged the Tenant is up to date with the payments required in order LTB-L-050650-22. However, the Landlord stated the Tenant had made other late payments. The Landlord submitted a ledger that showed the arrears payment for September 2023 was made three days late. The monthly rent for October 2023 was paid late by three days. The arrears payment for October 2023 was made one day late.
13. The Landlord submitted these late payments have caused considerable stress to them because they are a small Landlord. The lack of predictability in when payments would be made by the Tenant affects their ability to budget.
14. The Landlord submitted that pursuant to order LTB-L-050650-22, they had already waived a significant amount of the rent arrears. Their position was the Tenant is likely to continue making late payments. They also stated it would be unfair to grant the Tenant's motion because they had been dealing with the issue for over year considering when the original application was filed.
15. I asked the Landlord what prejudice they would experience if the Tenant made the remaining payments on time pursuant to order LTB-L-050650-22. The Landlord did not articulate any prejudice. They restated the history of the proceedings and their doubts the Tenant would abide by the requirement to make payments by the date they are due. They also submitted there are unpaid utilities that order LTB-L-050650-22 references. The order states the Tenant agreed to pay these utilities by December 31, 2023. I pointed out that December 31, 2023 had not yet arrived. The Landlord acknowledged this but stated no payments towards the utilities had been made as of the hearing date.

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

16. 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.

17. While I am satisfied the Tenant has made late payments, I note none of them were more than three days overdue. I can appreciate that some inconvenience was caused to the Landlord by these late payments and as such they are worried future payments will also be made late.
18. However, as of the hearing date, all of the required payments to the Landlord had been made by the Tenant. In the circumstances, I was not convinced it would be unduly prejudicial or unfair to the Landlord to allow the tenancy to continue subject to the remaining conditions in order LTB-L-050650-22. Particularly since the Landlord could not articulate any prejudice they would experience if the remaining conditions in the order were met.
19. The Tenant's motion will be granted and order LTB-L-065105-23, issued on September 25, 2023, will be set aside. The original order, LTB-L-050650-22, issued on August 18, 2023 remains in force. The dates the remaining payments are due pursuant to order LTB-L-050650-22 are not suggestions to the Tenant. They are Board ordered deadlines that require the Tenant's full attention and compliance. Since this order removes any confusion the Tenant may have had in relation to making late payments, I find in all the circumstances it would be most fair to give him one final opportunity to maintain his tenancy.

**It is ordered that:**

1. The Tenant's motion to set aside order LTB-L-065105-23, issued on September 25, 2023 is granted.
2. Order LTB-L-065105-23, issued on September 25, 2023, is cancelled and cannot be enforced by the Landlord.
3. The Landlord's application under section 78 of the Act is dismissed.
4. Order LTB-L-050650-22, issued on August 18, 2023, remains in force.

**November 22, 2023**

**Date Issued**

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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.