



Order under Section 69 Residential Tenancies Act, 2006

Citation: Cutler v Martinson, 2023 ONLTB 70626

Date: 2023-11-02

File Number: LTB-L-068437-22

In the matter of: 1/2, 128 Britannia Avenue Hamilton
Ontario L8H1X1

Between: Beverley Cutler Landlord

And

Brian Martinson Tenant

Beverley Cutler (the 'Landlord') applied for an order to terminate the tenancy and evict Brian Martinson (the 'Tenant') because the Tenant did not pay the rent that the Tenant owes.

This application was heard by videoconference on August 29, 2023.

The Landlord, the Landlord's Legal Representative, Anthony Corso, the Tenant, and the Tenant's support person, Kathy Cruickshanks, attended the hearing.

Determinations:

1. The Landlord served the Tenant with a valid Notice to End Tenancy Early for Non-payment of Rent (N4 Notice). The Tenant did not void the notice by paying the amount of rent arrears owing by the termination date in the N4 Notice or before the date the application was filed.
2. As of the hearing date, the Tenant was still in possession of the rental unit.
3. The lawful rent is \$740.05. It is due on the 1st day of each month.
4. Based on the Monthly rent, the daily rent/compensation is \$24.33. This amount is calculated as follows: \$740.05 x 12, divided by 365 days.
5. The Tenant has not made any payments since the application was filed.
6. The rent arrears owing to August 31, 2023 are \$16,012.40.

7. The Landlord incurred costs of \$186.00 for filing the application and is entitled to reimbursement of those costs.
8. The Landlord collected a rent deposit of \$714.00 from the Tenant and this deposit is still being held by the Landlord. The rent deposit can only be applied to the last rental period of the tenancy if the tenancy is terminated.
9. Interest on the rent deposit, in the amount of \$21.82 is owing to the Tenant for the period from December 2, 2021 to August 29, 2023.
10. The Tenant does not contest the total amount claimed by the Landlord and testified that he is withholding rent as there are maintenance issues in the rental unit. The Tenant seeks relief from eviction pursuant to subsections 83(3) (mandatory refusal of eviction) and 83(1) (discretionary relief from eviction) of the Act.
11. The question to be decided is whether mandatory refusal of eviction is required by subsection 83(3)(a) of the Act.
12. Where the Board is satisfied that the landlord is in serious breach of the landlord's responsibilities under the Act or of any material covenant in the tenancy agreement, it is mandatory to refuse the landlord's application for eviction. In addition to being serious, the Landlord's breach, whether of their responsibilities under the Act or of a material covenant, must also be occurring at the time of the hearing.
13. The Tenant's arguments fall under two areas: maintenance and discontinuance of non-vital services. The bulk of the Tenant's arguments and evidence relate to the allegation that there was an ongoing mould issue in the rental unit.
14. The Tenant claims that the temperature in the unit was either too cold or too hot during the winter months. The Tenant testified that he had mentioned the temperature issues to the Landlord in November 2021.
15. Mould was discovered in the rental unit in or around March of 2018. The Tenant testified that he had spent a few years cleaning the mould himself and had notified the Landlord periodically. On November 1, 2021, the Tenant advised the Landlord that he was withholding his monthly rent until the mould situation was rectified.
16. Prior to this, the Tenant had contacted the city of Hamilton to report the issues to the property standards division and a city inspector attended the unit to inspect. The city issued an order to comply regarding issues in the unit relating to drafty doors and windows as well as mould.
17. The Landlord had a technician come to the unit in January of 2021 to inspect and rectify the issues regarding the drafty doors and windows and to check the furnace. The Landlord had the windows in the unit replaced and sealed the doors. The Landlord had the furnace inspected on November 11, 2021 and no issues were found. The Landlord submitted a report from a heating and cooling company as evidence to support that she immediately investigated the issue complained about from the Tenant.

18. I note that this event was in the past and/or was not in issue at the time of the hearing. Nonetheless, I have considered the evidence regarding these issues as they were presented with respect to a pattern of behaviour at the hearing.
19. Furthermore, between January 2021 and November 18, 2022, the Landlord testified that they attempted to rectify the surface mould issues in the unit on a few occasions. The Landlord first cleaned the mould with cleaner and waited to see if it returned after having the windows and doors replaced and sealed. When it returned after that, the Landlord had the drywall replaced in many areas of the unit.
20. In November of 2022, the Landlord received an email from the city of Hamilton confirming that the order to comply was completed and no violations were found.
21. The Landlord testified that she assumed the mould and other issues the tenant raised in the unit were rectified. She states this because further to the city of Hamilton sending her the email in November of 2022 confirming the order to comply was completed, she hadn't heard from the Tenant regarding any future issues.
22. The Tenant disputes that he never contacted the Landlord after November 2022 but could not produce any documentation or details of when this conversation(s) happened.
23. The Tenant submitted photos of the unit prior to the Landlord rectifying the mould issues as well as photos that were date stamped on August 22, 2023. These photos show that there may be minimal surface mould in a few spots in the unit. Further, the pictures show that repair work of the drywall had been completed where the prior mould had been.
24. The Tenant submitted that living with mould was not healthy; but admitted he is not aware whether his health has been affected.

ANALYSIS

25. In order to be a bar to eviction under subsection 83(3)(a), the breach must be serious and must be continuing at the time of the hearing. The subsection is not triggered by the Landlords having been in serious breach of responsibilities at some point in the past [*Puterbough v. Canada (Public Works and Government Services)*, [2007] O.J. No 748 (Ont. Div. Ct.) and *MacNeil v. 976445 Ontario Ltd.*, [2005] O.J. No 6362 (Ont. Div. Ct.), *leave to appeal to C.A. refused ('MacNeil')*].
26. Although the presence of mould indicates a state of disrepair, based on the evidence before me, I am not satisfied that there is an ongoing serious breach of the Act. Furthermore, unless the disrepair is caused by or known to the landlord, a landlord will not be in breach of the Act if, when notified of the problem, the landlord takes prompt, reasonable and effective steps to rectify the disrepair.
27. While I am satisfied that the unit had previous mould issues that may be ongoing and which could potentially be the subject of a tenant maintenance application to the Board (I

make no findings in this regard), I am not satisfied that the issues rise to the level of a "serious breach" within the meaning of s. 83(3)(a) of the Act.

28. As a result, I am not required to deny eviction under s. 83(3)(a).

Other considerations regarding relief from eviction

29. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), including the impact of COVID-19 on the parties and whether the Landlord attempted to negotiate a repayment agreement with the Tenant and find that it would be unfair to grant relief from eviction pursuant to subsection 83(1) of the Act. The Tenant offered 5 cents a month to pay back the arrears of over \$14,000. For obvious reasons, I did not find this to be reasonable. The Tenant stated that he had been seeking alternative accommodation but had not gone to see any units as they are out of his budget.

It is ordered that:

1. The tenancy between the Landlord and the Tenant is terminated unless the Tenant voids this order.
2. **The Tenant may void this order and continue the tenancy by paying to the Landlord or to the LTB in trust:**
 - \$18,418.55 if the payment is made on or before November 13, 2023. See Schedule 1 for the calculation of the amount owing.
3. The Tenant may also make a motion at the LTB to void this order under section 74(11) of the Act, if the Tenant has paid the full amount owing as ordered plus any additional rent that became due after November 13, 2023 but before the Court Enforcement Office (Sheriff) enforces the eviction. The Tenant may only make this motion once during the tenancy.
4. **If the Tenant does not pay the amount required to void this order the Tenant must move out of the rental unit on or before November 13, 2023**
5. If the Tenant does not void the order, the Tenant shall pay to the Landlord \$14,618.10. This amount includes rent arrears owing up to the date of the hearing and the cost of filing the application. The rent deposit and interest the Landlord owes on the rent deposit are deducted from the amount owing by the Tenant. See Schedule 1 for the calculation of the amount owing.
6. The Tenant shall also pay the Landlord compensation of \$24.33 per day for the use of the unit starting August 30, 2023 until the date the Tenant moves out of the unit.

7. If the Tenant does not pay the Landlord the full amount owing on or before November 13, 2023, the Tenant will start to owe interest. This will be simple interest calculated from November 14, 2023 at 7.00% annually on the balance outstanding.
8. If the unit is not vacated on or before November 13, 2023, then starting November 14, 2023, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
9. 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 November 14, 2023.

November 2, 2023

Date Issued

Colin Elsby

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.

In accordance with section 81 of the Act, the part of this order relating to the eviction expires on May 14, 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.

Schedule 1
SUMMARY OF CALCULATIONS

A. Amount the Tenant must pay to void the eviction order and continue the tenancy if the payment is made on or before November 13, 2023

Rent Owing To November 30, 2023	\$18,232.55
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlord since the application was filed	- \$0.00
Less the amount the Tenant paid into the LTB since the application was filed	- \$0.00
Less the amount the Landlord owes the Tenant for an{abatement/rebate}	- \$0.00
Less the amount of the credit that the Tenant is entitled to	- \$0.00
Total the Tenant must pay to continue the tenancy	\$18,418.55

B. Amount the Tenant must pay if the tenancy is terminated

Rent Owing To Hearing Date	\$15,977.92
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlord since the application was filed	- \$0.00
Less the amount the Tenant paid into the LTB since the application was filed	- \$0.00
Less the amount of the last month's rent deposit	- \$714.00
Less the amount of the interest on the last month's rent deposit	- \$21.82
Less the amount the Landlord owes the Tenant for an {abatement/rebate}	- \$0.00
Less the amount of the credit that the Tenant is entitled to	- \$0.00
Total amount owing to the Landlord	\$14,618.10
Plus daily compensation owing for each day of occupation starting August 30, 2023	\$24.33 (per day)