



Order under Section 69 Residential Tenancies Act, 2006

Citation: Diggins v Wierzbicki, 2023 ONLTB 67457

Date: 2023-10-12

File Number: LTB-L-028318-22

In the matter of: 40 STIRTON ST
HAMILTON ON L8L6E8

Between: Alexandra Diggins and Ryan Mazzuca Landlord

And

Holly Wierzbicki Tenant

Alexandra Diggins and Ryan Mazzuca (the 'Landlord') applied for an order to terminate the tenancy and evict Holly Wierzbicki (the 'Tenant') because the Tenant did not pay the rent that the Tenant owes.

This application was heard by videoconference on August 21, 2023. The Landlords, Landlords' agent K. Hawkes, the Tenant and Tenant's legal representative K. Farrell attended the hearing.

Determinations:

Findings of Fact

1. The Landlords 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 \$1,310.50. It is due on the 1st day of each month.
4. Based on the Monthly rent, the daily rent/compensation is \$43.08. This amount is calculated as follows: $\$1,310.50 \times 12$, divided by 365 days.

Issues relating to rent

5. The Landlords claimed that the Tenant has paid \$14,687.14 since the application was filed. This amount was disputed by the Tenant who entered hand written and typed records of payments she alleged to have made from 2022 and 2023. She testified that the figures came from her banking app on her phone and that based on her calculations, she believes that she owes the Landlords \$5,711.50 to August 31, 2023. The Tenant's calculations were not supported by bank statements, copies of money transfers, receipts, etc.
6. The Landlords' agent asserted that the Landlords' records are accurate and denied that the Landlords failed to credit any payments received from the Tenant. A detailed ledger of all rent charges and payments was submitted into evidence by the Landlords.
7. In *Mauti v. Gibbs*, 2019 ONSC 3355 (CanLII), the Divisional Court held at paragraph 27 that while the Landlord bears the burden of proof in a rent arrears application, it is difficult for a landlord to prove a negative (i.e. non-payment of rent). Therefore, ". . .while the ultimate persuasive burden never shifts, once a landlord denies receiving funds, the tenant will have an evidentiary burden or a chance to advance some evidence to positively prove that he or she paid rent."
8. I find that the Tenant failed to provide sufficient documentary evidence to support a finding that more payments were made than credited by the Landlords. On a balance of probabilities, I find that the Tenant owes the Landlords rent for the months of April 2022 to August 2023. As stated, the Tenant provided no evidence supporting that payments were received by the Landlords and not credited to the Tenant. This is evidence that I would have expected to be readily obtainable, and I decline to find that the Tenant made additional payments as alleged. Therefore, I find that the rent arrears owing to August 31, 2023 are \$7,120.36.
9. The Landlord incurred costs of \$186.00 for filing the application and is entitled to reimbursement of those costs.

Is there a Last Month's Rent Deposit (LMR)?

10. The Landlord R. Mazzuca testified that there is no LMR. He led evidence of the transfer of the property to himself and his spouse on or around August 9, 2017. They entered the closing letter as evidence which state that the former landlord did not hold an LMR deposit from the Tenant because the former landlord applied the LMR to the month of August 2017. The letter stated that the Tenant had provided LMR to the former landlord in two installments, the first being \$250.00 on April 1, 2016 and the second being \$950.00 in the month of July 2017. The letter was not specific on the date in July 2017 that the Tenant made the second LMR deposit. The letter went on to say that the Tenant failed to pay the former landlord rent for the month of August 2017 and therefore, the former landlord arbitrarily allocated the LMR deposit to rent for the month of August 2017.
11. The Tenant testified that she paid the LMR to her former landlord in two installments, the first installment of \$250 was given in mid-March 2016 and the balance of \$950.00 was given on

April 1, 2016. She did not have records or receipts to support the payments or dates. She testified that she paid August 2017 rent to the Landlords as soon as they took possession by sending them a direct payment through the bank. This point was undisputed by the Landlords.

12. Pursuant to s. 106(10) of the Residential Tenancies Act, 2006 (the 'Act'):

A landlord shall apply a rent deposit that a tenant has paid to the landlord or to a former landlord in payment of the rent for the last rent period before the tenancy terminates.

13. I find that the former landlord collected and held LMR from the Tenant from April 1, 2016 in the amount of \$250 and from July 1, 2017 in the amount of \$1,200.00. The former landlord's attempt to apply LMR to a month which was not the last month of the tenancy is a contravention of s 106(10) of the Act. The failure of the former landlord to transfer the LMR deposit to the Landlords on closing of the property does not negate the Landlords' obligation to credit the Tenant for the LMR deposit.

14. Therefore, I find that the Landlords collected a rent deposit of \$1,200.00 from the Tenant and this deposit is still being held by the Landlords. The rent deposit can only be applied to the last rental period of the tenancy if the tenancy is terminated.

Relief from eviction

15. The Tenant testified that she has experienced personal, health and mental health issues since 2021, including a breakup, hospitalization and surgery in 2022. She has a 15-year-old child suffering from mental health issues for which they are receiving regular medical care at a nearby hospital and therefore, preservation of the tenancy is crucial to the Tenant and her child's well being. The Tenant is unable to maintain full time employment due to her child's health issues and her own. She has part time employment at minimum wage which pays approximately \$1,275.00 per month. She receives child support in the amount of \$600.00-800.00 per month depending on her needs. She receives \$650.00 monthly in child tax credit.

16. The Tenant requested that the Board issue a payment plan of \$250.00 on the 20th day of the month for 30 months. She testified that she is also considering her options with community services to assist with the arrears. She did not pursue these options before the hearing because she has been distracted with her child's health issues.

17. The Landlords' agent argued that the Tenant failed to mitigate the circumstances by refusing to respond to the Landlords' offer of a payment plan which would have some arrears already paid back. She also argued that the Tenant has not taken advantage of seeking out rent relief services which could have reduced the amount of the arrears and shortened the duration of a payment plan. She argued that the Landlords should not be required to extend credit to the Tenant for a lengthy period of time.

18. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), and find that it would not be unfair to grant relief from eviction subject to the conditions set out in this order pursuant to subsection 83(1)(a) and 204(1) of the Act. The Tenancy is relatively long term and the Tenant has dealt with life altering circumstances of recent times. While the Tenant's income is modest, I find that based the declared expenses, the Tenant can afford the payment plan proposed. There was no argument made on behalf of the Landlords regarding undue hardship if I impose a payment plan, whereas I find that termination of the tenancy would have significant adverse consequences for the Tenant and her child. Therefore the Tenant will be afforded the opportunity to preserve the tenancy provided that the following conditions are met.

It is ordered that:

1. The Tenant shall pay to the Landlord \$7,306.36 for arrears of rent up to August 31, 2023 and costs.
2. The Tenant shall pay to the Landlord the amount set out in paragraph 1 in accordance with the following schedule:
 - a) The Tenant shall pay \$250.00 on or before the 20th day of each month for 29 months commencing October 20, 2023 to February 20, 2026.
 - b) The Tenant shall make a final payment of \$56.36 on or before March 20, 2026.
3. The Tenant shall also pay to the Landlord new rent on time and in full as it comes due and owing for the period November 1, 2023 to March 1, 2026 or until the arrears are paid in full, whichever date is earliest.
4. If the Tenant fails to make any one of the payments in accordance with this order, the outstanding balance of any arrears of rent and costs to be paid by the Tenant to the Landlord pursuant to paragraph 1 of this order shall become immediately due and owing and the Landlord may, without notice to the Tenant, apply to the LTB within 30 days of the Tenant's breach pursuant to section 78 of the *Residential Tenancies Act, 2006* for an order terminating the tenancy and evicting the Tenant and requiring that the Tenant pay any new arrears, NSF fees and related charges that became owing after August 31, 2023.

October 12, 2023

Date Issued

Donna Adams

Member, Landlord and Tenant Board

15 Grosvenor Street, Ground Floor Toronto
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If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.