



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

Citation: Koch Enterprises Inc. v Dawson, 2023 ONLTB 64581

Date: 2023-10-04

File Number: LTB-L-036416-23

In the matter of: 703, 81 CHURCH ST
KITCHENER ON N2G4M1

Between: Koch Enterprises Inc. Landlord

and

Cacie-lyne Dawson
Bernard Thamvongs Tenants

Koch Enterprises Inc. (the 'Landlord') applied for an order to terminate the tenancy and evict Cacie-lyne Dawson and Bernard Thamvongs (the 'Tenants') because the Tenants did not pay the rent that the Tenants owe.

This application was heard by videoconference on September 13, 2023.

The Landlord's Legal Representative, Brittany Colley, and the Tenant Cacie-Lyne Dawson, on behalf of both Tenants, attended the hearing

Determinations:

1. The Landlord served the Tenants with a valid Notice to End Tenancy Early for Non-payment of Rent (N4 Notice). The Tenants 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. There was no dispute that the Tenants were in possession of the rental unit on the date the application was filed.
3. The Landlord claimed that Tenants vacated the rental unit on July 28, 2023, the date that the Landlord received one of two sets of keys in the mail from the Tenant, Cacie-Lyne Dawson. The Tenant claims that they vacated the rental unit on June 30, 2023.
4. I have considered all of the evidence presented at the hearing and all of the oral testimony and although I may not have referred to each piece of evidence individually or referenced all of the testimony, I have considered it when making my determinations.

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5. The Tenant relied on an email exchange between her co-tenant Bernard Thamyongs, and the Landlord confirming an agreement that the Tenants would vacate the rental unit by June 30, 2023. The email exchange shows that the Tenant, Cacie-Lyne Dawson, sent a follow-up email to the Landlord on July 1, 2023 confirming that she had left some items behind in the rental unit due to an altercation with a staff member at the building. The Landlord did not respond to that email until July 6, 2023, instructing the Tenant to remove all belongings left behind by the end of the day and to return all keys to the unit. The Tenant followed up to that email the following day advising that she had forgotten to leave her keys.
6. It wasn't until July 10, 2023 that the Landlord asked the Tenant to confirm if Bernard Thamyongs had also vacated the rental unit. The Tenant responded on July 19, 2023 that he had. The emails show that the Landlord continued to request that the Tenants return their keys, until July 28, 2023, when they were received by mail at the Landlord's head office.
7. The leading case on the meaning of whether a tenant is "in possession" of a rental unit is the Court of Appeal's decision in *1162994 Ontario Inc. v. Bakker*, 2004 CanLII 59995 (ON CA). In *Bakker* the Court held that possession of a rental unit refers to some form of control over that unit as demonstrated by such factors such as access to, use of, or occupation of the unit. I agree that whether a tenant has returned the keys is an important factor to consider when determining whether a tenant has given vacant possession of the unit to the landlord, however it is not determinative. Moreover, it is not uncommon for tenants to leave behind possessions when they vacate a rental unit, and so while I think it is a relevant factor, it too is not determinative.
8. The Landlord was aware that the Tenants would be vacating the rental unit on June 30, 2023 and the Tenants had until midnight on June 30, 2023 to remove their belongings. The Tenants communicated to the Landlord the following day that they had removed their belongings from the rental unit. If the Landlord was unsure as to whether the Tenants had vacated the rental unit, they had a duty to take reasonable steps to confirm whether they had vacated. Instead, the Landlord relied solely on the return of the keys to the rental unit as the determining factor of whether the Tenants had vacated the rental unit. Considering the circumstances, I find on a balance of probabilities that the Tenants vacated the rental unit on June 30, 2023. Rent arrears are calculated up to the date the Tenants vacated the unit.
9. It was not disputed that the lawful rent is \$2,201.10. It was due on the 1st day of each month.
10. The Landlord claimed that the Tenants have not made any payments since the application was filed.
11. The party bringing an application always carries the ultimate burden of proving their application on a balance of probabilities. However, once a landlord provides evidence that rent was not paid, the onus shifts to the Tenant to establish that the disputed payment was in fact paid.
12. The Tenant claimed that her co-tenant, Bernard Thamyongs, told her that he made a \$1,000.00 cash payment to the Landlord in June 2023 to be applied towards the rent arrears owing.

13. This is hearsay evidence. While the Board has the discretion to admit and rely upon hearsay under section 15 of the *Statutory Powers Procedures Act*, courts have warned that adjudicators must be alive to the inherent unreliability of hearsay evidence, and to ensure that its admission does not result in a procedurally unfair hearing for the other party.
14. I am satisfied that the evidence is necessary as I accept the Tenant's evidence that the co-tenant is currently incarcerated, and therefore not able to participate in the proceedings.
15. Generally, it is the Board's practice to prefer direct evidence over hearsay evidence. In this case, however, the Landlord did not have direct evidence to dispute that the alleged payment had been made. The Landlord did not attend through one of its employees, and thus adduced no evidence from any person with personal knowledge of the disputed June 2023 payment or lack thereof. The Landlord relied solely on their L1/L9 Update Sheet submitted by their Legal Representative. This too is hearsay evidence.
16. I prefer the evidence of the Tenant to the Landlord. While the Tenant did not have any documentary evidence to support the hearsay statement, her testimony was credible and while I did not find the Landlord's Representative to be non-credible, she did not have any knowledge of the payment in dispute. I find on a balance of probabilities that the Tenants have paid \$1,000.00 to the Landlord since the application was filed.
17. The rent arrears owing to June 30, 2023 are \$6,603.50.
18. The Landlord incurred costs of \$186.00 for filing the application and is entitled to reimbursement of those costs.
19. The Landlord collected a rent deposit of \$2,175.00 from the Tenants and this deposit is still being held by the Landlord. The rent deposit is applied to the arrears of rent because the tenancy terminated.
20. Interest on the rent deposit, in the amount of \$68.71 is owing to the Tenants for the period from December 2, 2021 to June 30, 2023.

It is ordered that:

1. The tenancy between the Landlord and the Tenants is terminated as of June 30, 2023, the date the Tenants moved out of the rental unit.
2. The Tenants shall pay to the Landlord **\$3,545.59**. This amount includes rent arrears owing up to the date the Tenants moved out of the rental unit and the cost of filing the application. The rent deposit and interest the Landlord owes on the rent deposit is deducted from the amount owing by the Tenants. See Schedule 1 for the calculation of the amount owing.
3. If the Tenants do not pay the Landlord the full amount owing on or before October 15, 2023, the Tenants will start to owe interest. This will be simple interest calculated from October 16, 2023 at 6.00% annually on the balance outstanding.

October 4, 2023
Date Issued

Candace Aboussafy
Member, Landlord and Tenant Board

15 Grosvenor St, 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.

**Schedule 1
SUMMARY OF CALCULATIONS**

A. Amount the Tenants must pay as the tenancy is terminated

Rent Owing to Move Out Date	\$6,603.30
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenants paid to the Landlord since the application was filed	- \$1,000.00
Less the amount the Tenants paid into the LTB since the application was filed	- \$0.00
Less the amount of the last month's rent deposit	- \$2,175.00
Less the amount of the interest on the last month's rent deposit	- \$68.71
Less the amount the Landlord owes the Tenants for an {abatement/rebate}	- \$0.00
Less the amount of the credit that the Tenants are entitled to	- \$0.00
Total amount owing to the Landlord	\$3,545.59

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