



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

Citation: Dwell Capital Group v Thompson, 2023 ONLTB 64529

Date: 2023-09-29

File Number: LTB-L-006270-23-SA

In the matter of: 5, 6 Sunset Blvd
Perth Ontario K7H2Y2

Between: Dwell Capital Group Landlord

And

Keith Thompson Tenant

Dwell Capital Group (the 'Landlord') applied for an order to terminate the tenancy and evict Keith Thompson (the 'Tenant') because the Tenant failed to meet a condition specified in the settlement mediated and issued in Board Order on March 16, 2021 with respect to application EAL-92203-2020.

The Landlord's application was resolved by order LTB-L-006270-23, issued on March 20, 2023. This order was issued without a hearing being held.

The Tenant filed a motion to set aside order LTB-L-006270-23.

The motion was heard by videoconference on April 26, 2023.

The Landlord's legal representative Marie Connolly, the Landlord's property manager Lucie Gagnon, the Landlord Tenant's legal representative Linda Trentor, the Tenant and Gemme Humenny CART service captioner attended the hearing.

Preliminary issue:

1. The Tenant's legal representative submitted that the L4 should not be entertained on the basis of an anonymous message sent to the Landlord by a former tenant who no longer resides in the rental complex. That it is not appropriate to formulate an eviction decision based on a former Tenant's text message as sent to the Landlord.
2. The Landlord's legal representative submitted that part of the declaration is also supported by the property managers allegations of December 2, 2022 when she attended at the rental complex and alleged first hand exposure to smoke smell as emanating from the Tenants unit.
3. In consideration of both submissions, the matter preceded to hearing of the merits of the Landlord's L4 application.

Determinations:

4. The previous application filed by the Landlord was based on a notice of termination that alleges the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant by smoking in the rental unit.
5. When the application came before the Board the parties voluntarily elected to try Board facilitated mediation. They then entered into a mediated agreement that says:
 - a) "The Tenant, any occupant of the rental unit or anyone the Tenant permits in the residential complex shall not smoke in the rental unit, the balcony or any of the common areas of the residential complex except for the designated smoking area located on the other side of the parking lot and, during the winter months only, the inside of his personal vehicle.
 - b) The terms of this order shall remain in effect for the duration of this tenancy."
6. The Landlord filed an application pursuant to s. 78(1) of the *Residential Tenancies Act, 2006* (the 'Act') alleging the Tenant smoked in his rental unit. Relying on a text of October 16, 2022 from a former Tenant of unit #9, a unit which is directly above Unit 5 in which it was stated: "I felt very uncomfortable with the level of the smoke smell that was present in my apartment in a variety of rooms. The smell was also present in the hallways and many times I was unable to open my windows and balcony door due to the waft of smoke that would enter through the windows as people would smoke on their balconies."
7. The Landlord followed up with a request for particulars, the response was: "The unit below mine was likely the culprit for the majority of the cigarette smoke. I would pass by it on my way up and smell it."
8. Furthermore, the Landlord's property manager stated in the Declaration as accompanying the Landlord's L4 application that she attended at the rental complex on December 2, 2022 at 8:30 a.m., and that there was a strong smell of cigarette smoke coming from Unit 5, that it was clear the tenant was smoking in the unit.
9. In response to the Landlord's application the Board issued an eviction order without holding a hearing pursuant to s. 78(6).
10. The Tenant seeks to set aside the eviction order on the basis that he did not breach the mediated agreement. He says:
 - "I smoke outside in my car but am finding this increasingly difficulty especially in the winter because of the risk of falling. I have managed to do so most of the time for two years.
 - I live in a small building and there are at least 4 smokers in the building.

- When I moved into the building 8 years ago I was specifically told I could smoke on my balcony. When the building sold my new landlord told us we could no longer smoke on our balconies.”
11. Although the Act permits the Board to issue eviction orders under s. 78(1) of the Act without a hearing, the Landlord still bears the burden of proof with respect to that application and filed a Declaration in support of it.
 12. It was submitted that the rental complex is comprised of 16 units, with 4 units per floor. It was not disputed that there are at least 6 smokers in the complex.
 13. The Tenant submits that prior to the current Landlord taking ownership he and other tenants were able to smoke on their balconies. He also does not deny that during the winter when there was an ice storm he has smoked in the rental unit as he feared for his safety, specifically falling in the parking lot in an attempt to enter his vehicle.
 14. On cross examination, the Landlord’s property manager confirmed that while she alleged smelling smoke odours emanating from the Tenant’s rental unit on December 2, 2022 she failed to knock on the Tenant’s door to confirm definitively because she said the Tenant continues to deny doing so.
 15. The property manager submits that there is a log of smells that has been recorded in the complex for the months of December 2022 through March 2023.
 16. The Tenant submits that in the last 2 plus years, since arriving at the mediated agreement, he has not received any letters or reminders from the Landlord with respect of allegations of smoking in his rental unit.
 17. The text message of the former tenant says that “people would smoke on their balconies.” This clearly suggests that his complaint to the Landlord was about the overall smell of smoke and the reference to “people” suggests that there are multiple smokers in the rental complex, this is consistent with the evidence before the Board.
 18. In the face of the Tenant’s submissions, I believe the burden rests with the Landlord to lead sufficient evidence to establish it is more likely than not that on the date in question the Tenant was smoking in the rental unit. I do not believe the Landlord has met that burden of proof.
 19. While the Tenant has admitted to smoking in the rental unit a couple of times during the winter, I am mindful of the mediated order has an indefinite duration, that the Tenant is elderly and suffers from a variety of medical issues impacting his mobility and that he has resided in the rental unit for close to 8 years. I also take into consideration that while there may have been written and agreed to lease language which prohibits smoking in all except for the designated areas, there was acceptance of tenants smoking on their balconies prior to the new Landlord taking ownership.
 20. Given all of the evidence before me I am not prepared to make a finding that it is more likely than not that on December 2, 2022, the Tenant was smoking in the rental unit. I

place little evidentiary value on the former Tenant's text message of October 16, 2022 as the message is general in nature, suggests multiple people smoke on their balconies and that the Tenant was "likely the culprit."

21. As a result, the Tenant's motion must be granted.
22. This order contains all of the reasons for the decision within it. No further reasons shall be issued.

It is ordered that:

1. The motion to set aside Order LTB-L-006270-23, issued on March 20, 2023, is granted.
2. Order LTB-L-006270-23, issued on March 20, 2023, is set aside and cannot be enforced.
3. The settlement mediated by the Board with respect to application EAL-92203-20 remains in effect.

September 29, 2023
Date Issued

Alicia Johnson
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.