



Order under Section 77(8) Residential Tenancies Act, 2006

Citation: Solmor Builders Ltd. v Majid, 2023 ONLTB 61686

Date: 2023-09-14

File Number: LTB-L-049708-23-SA

In the matter of: 092, 425 RATHBURN RD E
MISSISSAUGA ON L4Z1H6

Between: Solmor Builders Ltd. Landlord

And

Humayun Majid Tenant

Solmor Builders Ltd. (the 'Landlord') applied for an order to terminate the tenancy and evict Humayun Majid (the 'Tenant') and for an order to have the Tenant pay the rent they owe because the Tenant did not meet a condition specified in the order issued by the LTB on May 3, 2023 with respect to application LTB-L-063056-22.

The Landlord's application was resolved by order LTB-L-049708-23, issued on July 11, 2023. This order was issued without a hearing being held.

The Tenant filed a motion to set aside order LTB-L-049708-23.

The motion was heard by videoconference on August 30, 2023.

The Landlord's Legal Representative Francisco Gomez, the Tenant and the Tenant's Legal Representative Jayant Unny attended the hearing.

Determinations:

1. For the reasons below, I am persuaded that Order LTB-L-049708-23, issued on July 11, 2023, should be set aside.
2. The Landlord applied to the LTB under section 78 of the *Residential Tenancies Act, 2006* (the 'Act'), and obtained an order evicting the Tenant because the Tenant did not pay (i) the lawful rent on or before June 1, 2023 or (ii) \$1,333.10 towards rent arrears on or before June 15, 2023, as required.
3. The Tenant denies that she breached the terms of the conditional order and asks that the eviction order be set aside.
4. At the hearing, the parties agreed that the Tenant had asked the Landlord in advance to delay the rent payment due on June 1, 2023 and the Landlord provided their consent. They jointly submit, therefore, that the only issue to be determined at this hearing is whether the Tenant paid \$1,333.10 towards the arrears on or before June 15, 2023.
5. Specifically, the dispute relates to whether the Tenant made the arrears payment on June 15, 2023 or on June 16, 2023

Did the Tenant Breach the Agreement?

6. The Landlord claims that the Tenant paid the rent arrears late by one day, on June 16, 2023. The Landlord's Legal Representative submits that the Tenant ought to be strictly held to the terms of the order and the tenancy should be terminated.
7. As explained below, I find that there is little merit to that submission.
8. The Tenant H.M. testified that she has always paid the Landlord by cheque. She places the cheques into the drop box designated for tenant use. She stated that on June 15, 2023 she deposited a cheque for \$1,333.10 in the drop box before 5:00 p.m..
9. The Landlord confirmed receipt of the cheque on June 16, 2023. The Landlord then noted on H.M.'s account that payment was one day late.
10. I found H.M. credible. Her testimony was honestly given. I also find that the Landlord did not effectively contradict her evidence.
11. In my view, the Landlord was too hasty in bringing the L4 application to evict H.M.. The Landlord acknowledges that they erred by including the June 1, 2023 claim in the application. Due diligence was not performed before completing the application, to confirm that a breach had actually occurred.
12. With respect to the June 15, 2023 payment, if it was the case that the Landlord checked the drop box on June 15th, the Landlord ought to have noted on H.M.'s account that the cheque was not in the drop box when it the drop box was opened at the end of the day. There is, of course, a presumption that the Landlord would check the drop box at the end of the Landlord's business day.
13. No evidence was led that the Landlord checked the drop box at any time that day. There was no evidence that there were video surveillance cameras at the drop box location. No video or photographic proof was presented to contradict H.M.'s evidence. In fact, the Landlord's Legal Representative conceded that there was a "lack of evidence" that H.M. delivered the cheque on June 16th, as opposed to June 15th, as H.M. testified.
14. It seems to me that if the Landlord did not in fact check the drop box on June 15th, the Landlord ought to have confirmed with H.M., in writing, the date and time she dropped off the cheque and noted her response in her file. A simple inquiry to the Tenant might have forestalled the L4 application.
15. I note, too, that while there is a general expectation that rent is to be paid before the close of business day, "business" days are no longer 9:00 a.m. to 5:00 p.m. Mondays to Fridays. Transactions often occur on weekends, with varying business hours.
16. There is no stipulation in the consent order that the rent had to be paid by a specified time, e.g., by 5:00 p.m. or by 11:59 p.m.. Conceivably, a tenant could deposit a payment in the drop box at 11:59 p.m., and have it designated on their account as received on that day even if it was not collected by the landlord until first thing the next day.
17. The Landlord's Legal Representative suggested to H.M. that she had an obligation to inform the Landlord of her payment when she made it, given the importance of meeting the conditions in the order. H.M. replied that she has never routinely emailed the Landlord to confirm that a cheque was delivered.

18. There is no condition in the order requiring the Tenant to inform the Landlord when she makes a payment.
19. I am satisfied, on the balance of probabilities, that the Tenant did not breach the terms of the consent order. Based on the above, the order must be set aside.

Costs

Party Costs

20. The Tenant's Legal Representative submits that the Landlord's conduct was unreasonable and warrants an order that the Landlord pay the Tenant's representation/preparation fees as costs.
21. The Tenant's position is that the Landlord acted unreasonably by bringing the L4 application knowing that H.M. had not paid the rent late on June 1, 2023 and, even if H.M. had made the June 15, 2023 arrears payment one day late, that particular breach was minor and did not merit an eviction. In other words, the application, the eviction order, the consequent motion to set aside the order and this hearing were all unnecessary.
22. The Landlord opposes a cost award if the motion is granted. The Landlord's Legal Representative submits that the Landlord's actions were not malicious, suggesting the Landlord had an honest belief that they were simply following the normal course of action when tenants breach an order. Therefore, the Landlord should not be liable for costs.
 - *Awarding Costs Under Rule 23*
23. The Board has published Interpretation Guideline #3 "Costs" to assist the parties to understand how the Board normally approaches issues of costs under Rule 23.2 and 23.3 of the *LTB Rules of Procedure* :

A Member has the discretion to require a party to pay, as costs, any representation or preparation expenses of another party where the conduct of the party was unreasonable.
24. Conduct is unreasonable if it causes undue expense or delay and includes bringing a frivolous application or initiating an application in bad faith.
25. Although the Guideline is not binding on the Board, I see no reason not to follow it in this case.
 - *Technical Breaches and Eviction*
26. The Landlord's Legal Representative submits that the Landlord was properly exercising their rights under section 78 of the Act by filing the L4 application with the understanding that the Tenant's payment was made one day late.
27. The Board has previously considered that, although a payment may technically be late by a few days, a strict interpretation of the statute to allow an eviction in those circumstances was not the intention of the legislature. This is especially so given that subsection 78(11) of the Act expressly contemplates that an eviction may be set aside despite a tenant's breach of an agreement.
28. While the Act does provide for the possibility of eviction where any payment is made late contrary to the conditions of a Board order, the Landlord must also be guided by section 78

in its entirety. Subsection 78(11) of the Act requires landlords to engage in sound decision-making which takes into consideration the overriding principle of fairness.

29. The Board has held in a line of cases that payments delayed by one to three days constitute a very minor breach and do not warrant eviction. Members have found that it would be unfair, and an unnecessarily harsh interpretation, to allow landlords to immediately enforce the termination of a tenancy on such basis. The landlord would need to demonstrate that substantial prejudice to the landlord resulted from such an inconsequential breach.
30. This interpretation is also consistent with the objectives of the Act. In *Matthews v. Algoma Timberlakes Corp.*¹, the Court of Appeal states, at paragraph 22: “Given the remedial nature of the [Residential Tenancies] Act, its provisions must be interpreted liberally to ensure the realization of its objectives.” At paragraph 32, the Court concludes: “The purpose of the legislation is to provide protections to tenants.”
31. A tenant should not be faced with an eviction based on the landlord’s neglect, inadvertence or lack of diligence in following proper business practices. In this case, the threat of losing her home in a heated rental market for a payment made one day late no doubt caused H.M. enormous stress. H.M. was clearly making efforts to follow the payment plan.
32. That does not mean that tenants, including this Tenant, can flout a Board order by ignoring the payment date agreed to, resulting in persistently late payments. Such behaviour shows disrespect for the authority of the Board and cannot be condoned.
33. It does mean that the Board will consider all of the circumstances of the parties on a case-by-case basis, making determinations consistent with the purposes of the Act, and in some cases, the tenant’s pattern of behaviour will warrant an eviction.
 - *The Landlord Acted Unreasonably*
34. The conduct of the Landlord here has clearly been unreasonable. The Landlord knew, or ought to have known, that the application had no reasonable prospect of success.
35. By choosing to pursue this imprudent route knowing that they were wrong about the June 1, 2023 payment and that the existing law would not likely support the application with respect to the June 15, 2023 payment, the Landlord did not then withdraw the application.
36. Instead, the Landlord instructed their Legal Representative to pursue an unnecessary LTB process, which resulted in this successful, but ultimately unnecessary, motion to set aside. The Tenant retained a Legal Representative to prepare for this hearing. Both were compelled to rearrange their prior commitments in order to attend the hearing.
37. The Landlord ought to have been more circumspect before seeking an eviction order. Costs are therefore appropriate in the circumstances.
38. Pursuant to Rule 23.2 the Board may award costs of \$100.00 per hour of hearing and preparation time to a maximum of \$700.00.

¹ 2010 ONCA 468 (CanLII), [2010] O.J. No. 2710 (C.A.)

39. The Tenant's Legal Representative seeks costs of \$300.00. Having granted the motion, I find it is appropriate to award costs to the Tenant in the amount of \$300.00 to reflect the approximately 2 hours the parties attended at the hearing, plus 1 hour of preparation costs.

Costs to the Board

40. Interpretation Guideline 3 also says: "When a party or their agent or legal representative acts improperly or unreasonably in a proceeding, the Board may order one or more of them to pay to the Board an amount that will partly cover the expenses that the Board has incurred as a result of that conduct."
41. By pursuing an unmeritorious application in the course of the proceedings², the Landlord engaged a considerable amount of valuable LTB resources. This included the administrative processing of the L4 application and motion pleadings, as well as the engagement of at least two Board Members to assess and make determinations upon the application and the motion.
42. While I find that the Landlord's conduct is of the kind contemplated by Rule 23.4 of the LTB *Rules of Procedure*, I was not inclined to seek submissions on this issue. The Landlord was capably represented and will understand that similar improvident conduct in future may invite an order imposing such costs.

It is ordered that:

1. The motion to set aside Order LTB-L-049708-23, issued on July 11, 2023, is granted.
2. Order LTB-L-049708-23 is set aside and cannot be enforced. The L4 application is dismissed.
3. Order LTB-L-063056-22, issued on May 3, 2023, is unchanged. The Tenant must continue to make payments in accordance with the payment plan ordered.
4. On or by September 30, 2023, the Landlord shall pay to the Tenant costs of \$300.00.
5. If the Landlord does not pay the Tenant the full amount owing on or before September 30, 2023, the Landlord will start to owe interest. This will be simple interest calculated from October 1, 2023 at 6.00% annually on the balance outstanding.
6. The Tenant has the right, at any time, to collect the full amount owing or any balance outstanding under this order.

September 14, 2023

Date Issued

Elle Venhola

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.

² "Proceeding(s)" defined here as actions taken before the LTB to settle a dispute about rent arrears.