



Order under Section 69 Residential Tenancies Act, 2006

Citation: Cao v Desousa, 2023 ONLTB 60105

Date: 2023-08-31

File Number: LTB-L-047532-22

In the matter of: 155 LAKERIDGE DR
SCARBOROUGH ON M1C5K3

Between: Xiaoyan Cao and Jiwen Zhao Landlords

And

Manuel E Desousa and Carla M Desousa Tenants

Xiaoyan Cao and Jiwen Zhao (the 'Landlords') applied for an order to terminate the tenancy and evict Manuel E Desousa and Carla M Desousa (the 'Tenants') because the Tenants did not pay the rent that the Tenants owe (L1 application).

The Landlords also applied for an order to terminate the tenancy and evict the Tenants because:

- the Tenants have been persistently late in paying the Tenants' rent.

The Landlords also applied for an order requiring the Tenants to pay the Landlords' reasonable out-of-pocket expenses that are the result of the Tenants' failure to pay utility costs they were required to pay under the terms of the tenancy agreement (L2 application).

This L1/L2 application was heard by videoconference on August 10, 2023.

The Landlords and the Tenants attended the hearing.

Determinations:

L1 application

1. The Landlords served the Tenants with a valid Notice to End Tenancy Early for Nonpayment 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. As of the hearing date, the Tenants was still in possession of the rental unit.

Rent Increase and Rent due date

3. Based on the evidence before me, I find that the lawful rent is \$3,050.00. It is due on the 1st day of each month.
4. Based on the Monthly rent, the daily rent/compensation is \$100.27. This amount is calculated as follows: \$3,050.00 x 12, divided by 365 days.
5. The Landlords submitted that the rent increased on March 1, 2023 to \$3,125.00 which was agreed to by the Tenants.
6. This rent increase is illegal because the Landlord did not provide the Tenant with a valid notice of rent increase at least 90 days in advance using a prescribed form as required by section 116 of the *Residential Tenancies Act, 2006* (the 'Act').
7. The Act allows parties to agree to rent increases only in very limited circumstances. Section 121 of the Act states the following:
 - 1) A landlord and a tenant may agree to increase the rent charged to the tenant for a rental unit above the guideline if,
 - (a) the landlord has carried out or undertakes to carry out a specified capital expenditure in exchange for the rent increase; or
 - (b) the landlord has provided or undertakes to provide a new or additional service in exchange for the rent increase.
 - 2) An agreement under subsection (1) shall be in the form approved by the Board and shall set out the new rent, the tenant's right under subsection (4) to cancel the agreement and the date the agreement is to take effect.
 - 3) A landlord shall not increase rent charged under this section by more than the guideline plus 3 per cent of the previous lawful rent charged.
8. Subsection 123(1) of the Act states the following:
 - 1) A landlord may increase the rent charged to a tenant for a rental unit as prescribed at any time if the landlord and the tenant agree that the landlord will add any of the following with respect to the tenant's occupancy of the rental unit:
 1. A parking space.
 2. A prescribed service, facility, privilege, accommodation or thing.
9. There was no evidence before me that the Landlords and Tenants' agreement to increase the rent was pursuant to section 121 of the Act.
10. Subsection 3(1) of the Act states the following:

This Act, except Part V.1, applies with respect to rental units in residential complexes, despite any other Act and despite any agreement or waiver to the contrary.

11. Pursuant to section 3 of the Act parties cannot simply agree to a rent increase outside the Act. This would be inconsistent with the purpose of the Act, which is to protect residential tenants from unlawful increases.
12. The Court of Appeal for Ontario in the *Honsberger v. Grant Lake Forest Resources Ltd.*, 2019 ONCA 44 confirmed the once a tenancy has started, all rent increases must be in accordance with the Act's rent increase rules, and those rules apply even if the parties to an existing tenancy enter into a new tenancy agreement.
13. Given the above, I find that the lawful rent for the unit continues to be \$3,050.00 until the Landlords serve a valid Notice of Rent Increase in accordance with the Act.
14. There was no dispute that the parties agreed to amend the tenancy agreement from rent being due on the 20th of each month to rent being due on the 1st of each month effective December 1, 2022. The period of November 20th to November 30, 2022 was pro rated and that amount was paid by the Tenants to the Landlords.

Rent Arrears

15. The Tenants has paid \$19,702.74 to the Landlords since the application was filed.
16. There was no dispute that the rent arrears owing to August 19, 2023 are \$15,900.00
17. The Landlords incurred costs of \$186.00 for filing the application and is entitled to reimbursement of those costs.
18. There is no last month's rent deposit.

Persistent Late Payment of Rent

19. The Landlords served the Tenants a Notice to End Tenancy at End of the Term (N8 Notice) alleging that the Tenants have persistently paid their rent late pursuant to section 58 of the Act.
20. Section 58 of the Act states in part:
 - (1) A landlord may give a tenant notice of termination of their tenancy on any of the following grounds:
 1. The tenant has persistently failed to pay rent on the date it becomes due and payable.
 - (2) The date for termination specified in the notice shall be at least the number of days after the date the notice is given that is set out in section 44 and shall be the day a period of the tenancy ends or, where the tenancy is for a fixed term, the end of the term.

Emphasis added

21. The N8 Notice provides a termination date of October 26, 2022. There was no dispute that at the time the N8 Notice was served the monthly rent was due on the 20th day of the month. Therefore, the first day of each period of the tenancy is the 20th day of the month, and the last day of each period of the tenancy is the 19th day of each month. As a result, I find that the N8 Notice is defective as the termination date was not on the day a period of the tenancy ends.
22. The Landlords stated that a new N8 Notice was served on the Tenants with a termination date of July 31, 2023. This N8 Notice cannot be considered in this application. A copy of a Notice of termination must accompany the application when filing with the Board.

Utilities

23. In the L2 application, the Landlords claimed reasonable out-of-pocket expenses of \$1,524.26 as a result of the Tenants' failure to pay utility costs. At the hearing, the Landlords stated that this amount was paid by the Tenants after the application was filed.

Relief from Eviction

24. 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.
25. The Tenants reside in the rental unit with their three children. They stated that the location of the property is very convenient for their children's college and school. They want to remain in the rental unit and proposed that the arrears will be caught up by December 31, 2023. They had gone through a period where their work was going up and down. They have made changes to their financial situation. The Tenants offered to pay the rent as it comes due on the 1st of each month and an additional payment of \$950.00 on the 22nd of each month, with the balance of the arrears being paid in full by December 31, 2023.
26. The Landlords stated that they have been very patient with the Tenants in receiving rental payments. The Landlords also stated that the Tenants have made promises to pay previously and did not keep to those promises. The Landlords did not oppose giving the Tenants a further repayment plan provided that if they do not comply then the tenancy is terminated.
27. Given that the Tenants have made significant payments to the Landlords since this application was filed and that the Landlords are not opposing any repayment arrangement if they can terminate the tenancy for a breach, I find that it would be fair in these circumstances to order a repayment plan with a section 78 of the Act clause.

It is ordered that:

1. The Landlords' L2 application is dismissed.
2. The Tenants shall pay to the Landlords \$16,086.00 for arrears of rent up to August 31, 2023, and costs.
3. The Tenants shall pay to the Landlords the amount set out in paragraph 1 in accordance with the following schedule:

Date Payment Due	Amount of Payment
September 22, 2023	\$950.00 (arrears + costs)
October 22, 2023	\$950.00 (arrears)
November 22, 2023	\$950.00 (arrears)
December 31, 2023	\$13,236.00 (arrears)

4. The Tenants shall also pay to the Landlords the rent for September 2023 on or before September 5, 2023.
5. The Tenants shall also pay to the Landlords new rent on time and in full as it comes due and owing on the 1st day of each month for the period October 1, 2023 to December 31, 2023, or until the arrears are paid in full, whichever date is earliest.
6. If the Tenants fail 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 Tenants to the Landlords pursuant to paragraph 1 of this order shall become immediately due and owing and the Landlords may, without notice to the Tenants, apply to the LTB within 30 days of the Tenants' breach pursuant to section 78 of the Act for an order terminating the tenancy and evicting the Tenants and requiring that the Tenants pay any new arrears, NSF fees and related charges that became owing after August 31, 2023.

August 31, 2023

Date Issued

Lisa Del Vecchio

Member, Landlords and Tenants Board

15 Grosvenor Street, Ground Floor Toronto
ON M7A 2G6

File Number: LTB-L-047532-22

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

2023 ONL TB 60105 (CanLII)