



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

**Citation:** Cai v Habib, 2023 ONLTB 54441

**Date:** 2023-08-04

**File Number:** LTB-L-067339-22

**In the matter of:** 13 STONEBRIDGE DR  
MARKHAM ON L6C2C3

**Between:** Yifei Cai Landlord  
Bihui Xiong

**And**

Muneer M Habib Tenant  
Niloufer Ajani

Yifei Cai and Bihui Xiong (collectively the 'Landlord') applied for an order to terminate the tenancy and evict Muneer M Habib and Niloufer Ajani (collectively the 'Tenant') because:

- the Tenant has been persistently late in paying the Tenant's rent.

The Landlord also claimed compensation for each day the Tenant remained in the unit after the termination date.

This application was heard by videoconference on July 27, 2023.

The Landlord's Representative Rong Wei Yu and the Tenant's Representative Jaclyn Soloman attended the hearing.

**Determinations:**

1. As explained below, the Landlord has not proven on a balance of probabilities, the grounds for termination of the tenancy.
2. Therefore, the application is dismissed.
3. Because the Tenant has succeeded in defending the application, and for the additional reasons provided below, I will award costs to the Tenant in the form of the filing fee.
4. The Tenant was in possession of the rental unit on the date the application was filed.

**Preliminary Issue: The N8 Notice of Termination**

5. On October 25, 2022, the Landlord gave the Tenant an N8 notice of termination deemed served on 30 October 2022, because it was sent by post.

6. Ms. Solomon raised the preliminary issue that the service was invalid because the Certificate of Service did not state that the N8 was attached.
7. Section 53.2 of O.Reg 516/06 requires that landlords file “a copy of the notice of termination and a certificate of service of the notice of termination, if notice was given by the landlord.” In this case, while the Landlord did not file the N8 with the application, they filed and served it on the Tenant.
8. The Tenant admitted to receiving the N8 in November 2022 (see pg. 3 of Ms. Solomon’s Book).
9. I find there has been proper service of the N8 by mail. The N8 was served with the Landlord’s ledger, and the Tenant clearly knew the case it had to meet.

### **Persistent Late Application**

#### Evidence and Analysis

10. The N8 was served on the Tenant along with a ledger alleging that from 1 January 2018 to 1 October 2022, the rent was paid late 56 times out of 58 payments.
11. The parties agreed that from November 2022 to July 2023, the Tenant paid rent on time.
12. The issue that divided the parties, was whether rent had been paid persistently late from 1 January 2018 to October 2022.
13. Ms. Solomon argued that the parties had agreed for the payment of rent at a later date than the first of the month.
14. Mr. Yu’s ledger was premised on rent being payable or due on the first of the month, for the full period.
15. She referred me to her package of evidence at pg. 59. That contains a text message from the Tenant, (Muneer) dated January 10, 2019 to the Landlord’s agent Kale Li:

*Also you recall that Nilou had said to you in January 2018 that she gets paid around the 10<sup>th</sup> and you had said that was fine. Please accept our apologies but we will have the money sent to you each month by 10<sup>th</sup>.*

16. The Landlord replied: “okay thanks”.
17. Mr. Yu did not present any evidence to contradict this text exchange. In fact, he relied on the very same text messages in his arguments.
18. I find, on the basis of this text exchange, that as of January 2019, the Landlord did not object to payment of the rent on or before the 10<sup>th</sup> day of each month and that she was content with that arrangement or, at the very least, acquiesced with that arrangement.
19. That state of affairs, with retroactive effect from January 2018, continued through to April 2020, the onset of the COVID-19 pandemic.
20. On this basis, by looking at Mr. Yu’s ledger, for the 27 payments made between 1 January 2018 and April 2020, 13 were not late. I have given the Tenant only one day’s grace here,

in keeping with the Tenant's text saying payment by "around the 10<sup>th</sup> of the month", with agreement/consent from the Landlord.

21. The Tenant referred to the following text from the Landlord's agent, dated April 11, 2020:

*[I] am trying my best to agree with rent deferral, but cannot reduce. As you know, rent should start from 1<sup>st</sup> of the month, now it is 11<sup>th</sup>, only pay half now and rest in two weeks. It is what I can do my best, thanks, and look forward to the 1<sup>st</sup> half payment.*

22. In an earlier text, the same day, the Landlord had texted "*what I can do is, you can do rent deferral, like half today and half in two weeks. I think it helps at the moment...*"
23. I find that as of April 2020, the Landlord offered the Tenant a flexible payment arrangement, where rent could be paid in 2 installments, half around the 11<sup>th</sup> of the month and half around the 25<sup>th</sup> of the month. No exact dates were set.
24. I find that this state of affairs continued from April 2020 to September 2021.
25. Out of 17 payments during that period, one was late, with only one whole payment being paid late on the 29<sup>th</sup> of the month.
26. Mr. Yu referred me to the following text exchange between the Tenant and Landlord, dated September 19, 2021:

Landlord: "I have not got rent! It is 19<sup>th</sup> today. It has been back to normal (sic), from Oct, I need rent on 1<sup>st</sup> day of month, no delay please."

Tenant: "As we set (sic) Nilou gets paid on 10<sup>th</sup>. She will send her portion then. I will submit on 1<sup>st</sup>."

27. In their reply, the Landlord did not argue that the arrangement was not feasible, nor object, and simply asked for the password for the e-transfer, which was given for the September payment.
28. There was also some text messages in evidence from 2022, at pgs. 104 – 109 of the Tenant's book. In August 2022, rent appears to have been paid in halves, with the first half on the 1<sup>st</sup>. In September, the Landlord confirmed this with a text objecting that "*not half the rent had been sent*" on the first of the month. In my view, this confirms that the Landlord was accepting rent in half payments without any objection. This continued through to December with similar text exchanges.
29. On the basis of the entirety of the parties' conduct, I find that the Landlord acquiesced to rent being paid in halves from September 2021 onwards.
30. Returning to Mr. Yu's ledger, that means that of 14 payments coming due between September 2021 – October 2022, only 2 were actually late in the context of the parties' arrangement.
31. The result is that Mr. Yu's ledger looks very different when one considers the correspondence between the parties, as Ms. Soloman urged me to do.

32. Out of 58 payments from January 2018 to October 2022, 17 were late. Or, in other words, the Tenant was late about 29% of the time.
33. In my view, this does not qualify as persistently late.
34. I also bear in mind that the Tenant has paid rent on time from October 2022 to the date of the hearing, July 27, 2023.
35. In my view, the Landlord has not proved his case on a balance of probabilities.
36. Moreover, in my view, the Landlord should not have argued that 56 payments were late without mentioning the email correspondence, and for this reason I will make a costs order against the Landlord.
37. As a result, the application is dismissed.

**It is ordered that:**

1. The Landlord's application is dismissed.
2. The Landlord shall pay the Tenant the costs of the hearing in the amount of \$186.00.

**August 4, 2023**  
**Date Issued**

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James Campbell  
Member, Landlord and Tenant Board

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