



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

Citation: Said v Lyons, 2023 ONLTB 53473

Date: 2023-08-01

File Number: LTB-L-006683-23

In the matter of: 735 PARKVIEW CRES
CAMBRIDGE ON N3H5A1

Between: Hadia Sayed, Nasima Sayed, Hamoon Sayed and Burhanudin Sayed Landlords

And

Marlene Silva Lyons and Rosa Daniella Tenant Aguanno

Hadia Sayed, Nasima Sayed, Hamoon Sayed and Burhanudin Sayed (the 'Landlords') applied for an order to terminate the tenancy and evict Marlene Silva Lyons and Rosa Daniella Aguanno (the 'Tenants') because: (a) the Tenants did not pay the rent; (b) the Landlords require possession of the rental unit for residential occupation by one of them for at least one year; and (c) the Tenants have been persistently late in paying rent.

This application was heard by videoconference on June 5, 2023. The Landlords and the Tenants attended or were represented at the hearing. I heard evidence from Hamoon Sayed, Hadia Sayed, Marlene Silvia Lyons and Shannon Newell.

The Tenants filed a T2 application—LTB-T-082089-22—asserting they were illegally locked out of the rental unit. That application was adjourned and will be heard by me at a later date.

Determinations:

N12—Personal Use

1. On January 6, 2023, the Landlord served an N12 notice with a March 31, 2023 termination date.
2. The Landlords filed an affidavit sworn by Hamoon Sayed on March 22, 2023. In that affidavit, Mr. Sayed indicates that he intends to move into the rental unit for purposes of residential occupation. This affidavit satisfies the requirement of subsection 71.1(1) and section 72 of the *Residential Tenancies Act, 2006* (the 'RTA').

3. In order, however, to obtain, an order under section 69 of the RTA based on the assertion that they want to retake possession of the rental unit for purposes of residential occupation under section 48 of the RTA, the Landlords must also establish that they provided the Tenants with the compensation required by section 48.1 by March 31, 2023. **[RTA, ss. 55.1 and 83(4)]**
4. In his affidavit sworn on March 22, 2023, Mr. Sayed asserted that he instructed the Tenants not to pay rent in February 2023 as it would constitute the compensation required by the RTA.
5. Mr. Sayed initially testified that, on January 6, 2023, he verbally told Ms Lyons that the Tenants would not have to pay rent for one month as compensation, but did not specify that it was rent for February of 2023. Mr. Sayed later clarified that he indicated to Ms Lyons that she did not have to pay rent for next month 'if she didn't want' to because that would be the compensation required by the RTA.
6. I am not satisfied that the Landlords have established that they provided the compensation required by sections 48.1 and 55.1.
7. Section 48.1 does not require a landlord to pay the tenant money. A landlord can provide the required compensation by waiving rent for a period before the termination date. **[See, for example, *TNT-05879-18 (Re)*, 2018 CanLII 113853 (ON LTB)]** However, in my view, a tenant is only 'compensated' by a waiver of rent when the landlord clearly, unequivocally **and in writing** waives the rent for a month before the termination date on the N12. In this case, not only was the notice provided to the Tenants not in writing, it was not unequivocal.
8. If I am not correct and Mr. Sayed's verbal waiver of rent was sufficient for section 48.1, I am not satisfied that the Landlords have established that they waived rent for the month of February of 2023. I note that when the Tenants made a partial rent payment for February of 2023¹, the Landlords did not return the payment or advise the Tenants that the rent for February of 2023 had been waived.
9. The Tenants also asserted that the LTB had no jurisdiction to consider the L2 because the Landlords did not disclose on the L2 application the fact that previous N12 notices had been delivered. They relied on subsection 71.1(2) and (3), which say:

71.1 (3) A landlord who, on or after the day subsection 11 (2) of Schedule 4 to the Protecting Tenants and Strengthening Community Housing Act, 2020 comes into force, files an application under section 69 based on a notice of termination given under section 48, 49 or 50 shall, in the application,

¹ The evidence was that the Tenants e-transferred funds that were specifically referred to as being (partial) rent for February of 2023.

- (a) *indicate whether or not the landlord has, within two years before filing the application, given any other notice under sections 48, 49 or 50 in respect of the same or a different rental unit; and*
 - (b) *set out, with respect to each previous notice described in clause (a),*
 - (i) *the date the notice was given,*
 - (ii) *the address of the rental unit in respect of which the notice was given,*
 - (iii) *the identity of the intended occupant in respect of whom the notice was given if the notice was given under section 48 or 49, and*
 - (iv) *such other information as may be required by the Rules.*
- (4) *The Board shall refuse to accept the application for filing if the landlord has not complied with subsection (3).*

10. Given my finding concerning whether the Landlords provided the compensation required by section 48.1, I do not need to consider the application of subsections 71.1(3) and (4), but I will.
11. The issue with the application of subsection 71.1(4) of the RTA in practice is that there is no process for ‘screening’ applications filed electronically under section 69 based on sections 48, 49 or 50 of the RTA to determine if they are compliant with subsection 71.1(3). Indeed there is no way the LTB could, as a practical matter, determine if a landlord has disclosed on an L2 application all of the notices under sections 48, 48 or 50 that were delivered in the preceding two years. Landlords are not required to ‘register’ the delivery of an N12 notice.
12. In my view, the correct way to interpret subsection 71.1(4) of the RTA is to prohibit the LTB from making an order under section 69 terminating the tenancy and evicting the tenant where it is established that the landlord has not complied with subsection 71.1(3).
13. In this case, the Tenants asserted that the L2 did not refer to a previous N12 based upon which the Landlords had brought a prior application to the LTB—LTB-L-073348-22 (previously SWL-58329-22). The Landlords indicated that there was no previous N12 and that LTB-L-073348-22 was based on only an N11 agreement.
14. Based on the evidence before me, I find that the Tenants have not established on the balance of the probabilities—that it is more likely than not—that the Landlords have not complied with subsection 71.1(3). The Tenants could not provide me with a copy of the

N12 they assert was delivered². An order issued in LTB-L-073348-22 on December 15, 2022 appears to indicate that no N12 was served. The Tenants argued that this order could be interpreted as indicating that an N12 was delivered, but I do not think that interpretation is correct.

N4—Failure to Pay Rent

15. On January 6, 2023, the Landlord also served an N4 notice with a January 24, 2023 termination date.
16. On the N4, the Landlords asserted that the Tenants owed \$31,400.00 in rent as of January 6, 2023. The Tenants asserted that this was not the correct amount owing and that the N4 was, as a result, invalid and could not support an application under section 69 of the RTA.
17. Subsection 59(2) of the RTA requires that an N4 notice set out the (correct) amount of rent that is due. An N4 notice that does not specify the right rent owed is invalid and cannot support an application under section 69.
18. The Tenants argued that the N4 did not set out the correct rent because the amount claimed on the N4 as being owed included rent for the entire months of December of 2022 and January of 2023, but the Tenants were not in possession of the unit from December 29, 2022 until January 6, 2023 as a result of an order made by the LTB terminating the tenancy.
19. I accept the Tenants' argument and find that the Tenants were only obliged to pay *per diem* 'occupation' rent after the tenancy was terminated [RTA, s. 87(3)] such that the N4 did not set out the correct rent owing as required by subsection 59(2). The fact that the tenancy was later 'reinstated' did not, in my view, change the fact that the Landlords were only entitled to *per diem* occupation rent between the termination and 'reinstatement' of the tenancy and rent was not payable by Tenants from December 29, 2022 to January 6, 2023.
20. The fact that an N4 is invalid does not necessarily mean that the L1 application on which it is based must be dismissed. An L1 application includes a request that the LTB terminate the tenancy and evict the tenant under section 69 of the RTA and a request for arrears under section 87. [See *Nejad v Preddie*, 2016 ONSC 4348 (CanLII)] Because an N4 is required under section 87, it is possible for the LTB to 'sever' the request for an order under section 69 from the application and to proceed under section 87 alone. [See *Nejad v Preddie*, 2016 ONSC 4348 (CanLII) (ON LTB)] This is sometimes referred to as 'converting' the L1 application to an L9 application

² The Tenants legal representative asserted that she had seen a copy, but she was not able to locate a copy of the documents. I am not prepared to accept the 'evidence' of a legal representative on material facts that are in dispute on an application.

21. Rather than having the L1 application dismissed, the Landlords abandoned the request for an order under section 69 and requested that the LTB make an order under section 89 that the Tenants pay the arrears owed. The Tenants consented.
22. The Tenants asserted that they owed the Landlords \$27,511.29. Based on my finding concerning the rent for December 29, 2022 to January 6, 2023, the difference between the amount the Tenants asserted they owed and the amount the Landlords asserted the Tenants owe was \$1,400.00. This difference resulted from a dispute over a \$1,400.00 cash payment the Tenants assert was made on December 11, 2021.
23. Ms Lyons testified that, on December 11, 2021, she gave \$1,400.00 in cash to Ms Sayed. Ms Sayed testified that she did not receive the \$14,00.00 and never met with Ms Lyons on December 11, 2021. Ms Lyon's evidence was corroborated by Ms. Newell who testified that she witnessed Ms. Lyons give \$1,400.00 in cash to Ms Sayed on December 11, 2021. Ms Sayed testified that she had an appointment in Vaughan, Ontario on the evening on December 11, 2021 so she could not have been in Cambridge, Ontario, but the evidence of Ms. Lyons and Ms. Newell was that the payment was made in the morning on December 11, 2021.
24. I find that the Tenants paid \$1,400.00 to the Landlords on December 11, 2021 and, consequently, that the Tenants owe the Landlords \$27,511.29 in rent.

N8—Persistently Late

25. On January 6, 2023, the Landlord also served an N8 with a termination date of March 31, 2023 asserting that the Tenants were persistently late in paying rent.
26. The document that the Landlords attached to the N8 is confusing. I am, however, satisfied that the Tenants were persistently late in paying rent insofar as the Tenants appear, based on the rent arrears calculation filed by the Tenants, to have paid the rent late in four of the five³ months in which rent was paid between October of 2021 and December of 2022.
27. There may be a distinction to be made between the failure of a tenant to pay rent—which would entitle a landlord to terminate the tenancy under section 59 of the RTA—and a tenant being persistently late in paying rent under section 58, but there can be no doubt, in my view, that a tenant who pays rent late in, for example, three of the 12 months preceding the delivery of an N8 notice and does not pay rent at all for the remaining nine months has been persistently late in paying rent.
28. Based on the facts, I must consider the application of subsection 83(3) of the RTA, which says:

³ Rent for the fifth month—December of 2021—was paid on time because the illegal rent deposit described below was applied to pay the rent.

83 (3) *Without restricting the generality of subsection (1), the Board shall refuse to grant the application where satisfied that,*

(a) the landlord is in serious breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement;...

29. The Landlords admitted that they collected an illegal rent deposit in contravention of section 106 of the RTA. In order, however, for paragraph 83(3)(a) to be triggered, the breach must not only be serious—which collecting an illegal rent deposit is—but it must also be ongoing at the time of the hearing. **[See *Jensen v. Johnson*, 2022 ONSC 4303 (CanLII)]** In this case, the breach was not ongoing. The parties agreed that the Landlords applied the additional deposit to rent payable by the Tenants for December of 2021.
30. The Landlords requested that I terminate the tenancy and evict the Tenants.
31. The Tenants requested that, rather than terminating the tenancy and evicting them, I make what is typically referred to as a 'prompt payment' order—an order requiring the Tenants to pay their rent in full and on time for a period to time failing which the Landlords may apply to the LTB without notice under section 78 for an order terminating the tenancy and evicting the Tenants.
32. I have decided to make a 'prompt payment' order.
33. In the circumstances, I think it is appropriate to provide the Tenants with an opportunity to preserve the tenancy.
34. The Tenants have made sufficient payments to the Landlords since these applications were filed such that no further arrears have accumulated, although they admit that they have, from time to time, paid the monthly rent otherwise than on the 1st of the month. They have also committed to pay the arrears.
35. The Landlords asserted that they have experienced financial hardships as a result of the failure of the Tenants to pay rent and wish to terminate the tenancy so that Mr. Sayed can move into the rental unit. There was evidence that Hadia Sayed and Burhanudin Sayed have fallen behind in paying their rent and an L1 application—LTB-L-003702-23—has been brought against them by their landlords⁴.
36. In my view, A 'prompt payment' order will properly balance the interest of the Landlords and the Tenants. A 'prompt payment' order does not prevent the Landlords from delivering a (new) N12 and, until an L2 application based one that N12 can be heard, the Landlords will either receive the monthly rent or be able to obtain an order terminating the tenancy and evicting the Tenants. I also note that the termination of the tenancy and the eviction of the Tenants will not necessarily assist the Landlords in addressing any financial issues they are facing, but a regular stream of rental income might.

⁴ That application was resolved by a conditional order issued on April 24, 2023.

It is ordered that:

1. The Tenants owe the Landlords \$27,511.29. If the Tenants do not pay the Landlords the full amount owed on or before September 15, 2023, the Tenant will start to owe interest. This will be simple interest calculated from September 16, 2023 at 6.00% annually on the balance outstanding.
2. To the extent that they have not already done so, the Tenants shall pay to the Landlords the full rent payable for each of June, July and August of 2023, on or before August 10, 2023.
3. Tenants shall pay to the Landlords the full monthly rent, which is currently \$2,700.00, on the 1st day of each month for 18 months beginning September 1, 2023.
4. If the Tenants fail to make any one of the payments required by paragraphs 2 or 3 of this order, the Landlords may, without notice to the Tenants, apply to the LTB under section 78 of the *Residential Tenancies Act, 2006* for an order terminating the tenancy and evicting the Tenants, and requiring that the Tenants pay any rent arrears, and NSF fees and related charges owing after August 1, 2023.

August 1, 2023

Date Issued

E. Patrick Shea
Vice Chair, 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.