



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

Citation: Mierau v Bevan, 2023 ONLTB 50745

Date: 2023-07-18

File Number: LTB-L-001594-21

In the matter of: 18 BOULTON ST
PERTH ON K7H2W3

Between: Scott Mierau Landlord

And

Lori Bevan Tenant

2023 ONLTB 50745 (CanLI)

Scott Mierau (the 'Landlord') applied for an order to terminate the tenancy and evict Lori Bevan (the 'Tenant') because the Tenant did not pay rent.

This application was heard by videoconference on June 2, 2023. The Landlord and the Tenant attended the hearing. Stephen Halpenny represented the Landlord.

I heard evidence from the Tenant and the Landlord. The Tenant delivered a post-hearing written submission. I did not request—and did not consider—that submission.

Determinations:

I. Introduction

1. There were two applications before me: an L1 application—LTB-L-001594-21—and a T2 application—LTB-T-037820-23. The T2 application was adjourned and will be heard at a later date. I determined the L1 application, but I am ordering the Landlord not to take any steps to enforce this order until the Tenant's T2 application is determined

II. L1 Application

2. The Landlord served an N4 notice terminating the tenancy and, on December 17, 2021, filed an L1 application seeking an order terminating the tenancy and evicting the Tenant.
3. The Tenant lived in the unit when the L1 was filed. The Tenant has not, however, lived in the unit since January of 2022.
4. The reason(s) why the Tenant vacated the unit is an issue between the parties, but I do not have to determine that issue to determine the Landlord's application.
5. On May 10, 2023, the Tenant filed a T2 application asking the LTB to: (a) terminate her tenancy as of January 31, 2022; and (b) award her compensation based on the actions of the Landlord and the Landlord's property manager.

6. Before me on June 2, 2023, the Landlord agreed that the tenancy was terminated on January 31, 2022.¹ As a result, there was no need for me to terminate the tenancy. All that remained to be determined was what the Tenant owed as of February 1, 2022.
7. It is not uncommon for the LTB to 'convert' an L1 application to an application for arrears under section 87. **[See *Nejad v Preddie*, 2016 ONSC 4348 (CanLII) and *TNT-64160-14-RV-AM (Re)*, 2015 CanLII 35872 (ON LTB)]**
8. Section 87 of the *Residential Tenancies Act, 2006* (the 'RTA') says, in part:

87 (1) A landlord may apply to the Board for an order requiring a tenant or former tenant to pay arrears of rent if,

 - (a) the tenant or former tenant did not pay rent lawfully required under the tenancy agreement; and
 - (b) in the case of a tenant or former tenant no longer in possession of the rental unit, the tenant or former tenant ceased to be in possession on or after the day subsection 18 (1) of Schedule 4 to the *Protecting Tenants and Strengthening Community Housing Act, 2020* comes into force.

(1.1) An application under subsection (1) may be made,

 - (a) while the tenant is in possession of the rental unit; or
 - (b) no later than one year after the tenant or former tenant ceased to be in possession of the rental unit.
9. An L1 application includes a request for arrears under section 87 and a request that the LTB terminate the tenancy and evict the tenant under section 69 of the RTA. **[See *Nejad v Preddie*, 2016 ONSC 4348 (CanLII)]** It is possible to 'sever' the request for arrears under section 87 from the request under section 69.
10. I note that the Tenant raised an issue regarding the validity of the N4 based on the amount the N4 indicated was owed by the Tenant.
11. Whether or not the N4 was valid is irrelevant. An application for arrears only does not involve the termination of the tenancy, and, as a result, a valid N4 is not a prerequisite to making an order that the Tenant pay arrears. **[See *Nejad v Preddie*, 2016 ONSC 4348 (CanLII) (ON LTB)]**
12. The Landlord initially asserted that the Tenant owed \$21,760.00 in rent. The Tenant disputed this on the basis that: (a) she vacated the rental unit on January 31, 2022 and was not liable for rent after that date; (b) she paid rent for three months in which the Landlord claimed no rent was paid; and (c) the Landlord acquired the residential complex and did not take an assignment of the rent owing as at the date the purchase transaction

¹ The remedies the Tenant is seeking on the T2 application include a claim for the difference between the rent she is currently paying and what she was paying for the rental unit.

closed such that she owes this rent to the previous owner of the complex and not the Landlord.

A. Tenancy Terminated on January 31, 2022

13. As noted above: (a) the Tenant filed a T2 application asking that the LTB terminate the tenancy on January 31, 2023²; and (b) the Landlord agreed that the tenancy terminated on January 31, 2022. As a result, the Tenant is not liable to pay rent after January 31, 2022.

B. Rent Arrears were Assigned to the Landlord

14. The Landlord purchased the residential complex in October of 2020. The purchase agreement was not before me, but I accept the Landlord's assertion that the assets purchased from the previous owner of the complex included rent arrears—that the Landlord took an assignment of any arrears owing by the Tenant as of October of 2020. The previous owner signed a direction—DOC-1370468—directing the Tenant to pay 'all future rent payments and all rent payment arrears, from and including the 9th day of October, 2020' to the Landlord. This direction was delivered to the Tenant, which resulted in a legal assignment of the debt. **[See *Conveyancing and Law of Property Act*, s. 53]**

15. The Tenant asserts that the arrears owing to her previous landlord could not have been assigned to the Landlord because her previous landlord had not served an N4. It is not, in my view, necessary for a landlord to serve an N4 notice to 'crystalize' a claim for unpaid rent or for an N4 to have been delivered for the purchaser of a residential complex or rental unit to take an assignment of any rent owing

16. This issue ultimately fell by the wayside when the Landlord agreed to waive any rent owing as of October of 2020.

C. Rent Owing by the Tenant

17. The Landlord asserted that the Tenant owed \$10,880.00 in rent as of February 1, 2022. This consisted of rent for July to October of 2020 and March of 2021 to January of 2022.

18. There is no dispute that the Tenant paid her rent in cash.

19. The Tenant produced a receipt indicating that rent for October of 2020 had been paid. The Landlord initially suggested that the receipt was provided in error, but ultimately agreed that rent had been paid for October of 2020.

20. Notwithstanding having acquired/taken an assignment of the rent owing by the Tenant as of October of 2020, the Landlord also agreed to waive the rent for July, August and September of 2020.

21. The Tenant claimed that, in March of 2021, she applied for rent assistance and provided the Landlord with what was described as a 'rent subsidy form'—DOC-1378460---for him to complete, but the Landlord did not fill it out properly or return the form until after the subsidy was no longer available to her.

² On the T2 the Tenant asserts that she permanently moved out of the unit on May 21, 2022.

22. The Tenant also asserted that she and her legal representative attempted to pay rent to the Landlord. There was an e-mail from May 5, 2021—DOC-1384420—in which the Landlord's legal representative was advised that: (a) the Landlord had stopped coming to the unit to collect rent; and (b) the Tenant did not have internet or online banking, or a vehicle.
23. While I have concerns concerning the Landlord's actions as described by the Tenant, I am unable to find that the Landlord's actions result in the Tenant not being obliged to pay rent—I am unable to find the Landlord by its actions waived rent for March of 2021 to January of 2022.
24. There was no evidence that the Tenant tendered rent to the Landlord and, while she indicated that she was aware of the procedure for doing so, the Tenant did not apply to pay rent into the LTB. The Tenant also stated that it was her choice to not use online or internet banking.
25. The Landlord's actions might have been grounds for me to refuse to terminate the tenancy and evict the Tenant based on the application of section 83 of the RTA, but section 83 has no application where all a landlord is seeking is an order that the tenant pay arrears—it only applies won an application for an order evicting a tenant. **[RTA, s. 83(1)]** In my view, the Tenant may also have a claim for compensation based on the actions of the Landlord. That claim will be determined on the Tenant's T2 application. To the extent it is necessary to do so, I grant the Tenant permission to amend the T2 application to assert such a claim
26. I find the Tenant owes \$7,480.00 (\$680.00 X 11) to the Landlord. The Landlord is also entitled to recover from the Tenant the \$186.00 filing fee that he paid.

III. T2 Application

27. The T2 application was filed on May 10, 2023.
28. As noted above, I adjourned the T2 application.
29. Rule 21.9 of the LTB's Rules of Procedure says that a hearing may be adjourned where the Member is satisfied that an adjournment is required to permit an adequate hearing to be held considering:
 - (a) the reason for the adjournment and position of the parties;
 - (b) the issues in the application;
 - (c) any prejudice that may result from granting or denying the request;
 - (d) the history of the proceeding including other adjournments or rescheduling; and
 - (e) the LTB's obligation to adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter.
30. In my view, the proper determination of the T2 on its merits requires an adjournment and there was no prejudice to the Tenant in adjourning the T2.

31. The Tenant filed her evidence seven days prior to the scheduled hearing.
32. The Tenant insisted that I had to hear the T2 application with the landlord's application because it was scheduled by the LTB to be heard on June 2, 2023. However, the Tenant also asserted that she did not have sufficient time to fully prepare and had rushed to pull together evidence in support of the T2.
33. The Landlord asserted that there was not sufficient time to properly respond to the evidence filed by the Tenant.
34. The T2 application makes very serious allegations against the Landlord and his property manager. There are also allegations made concerning members of the Ontario Provincial Police.
35. As a practical matter, some of the relief sought by the Tenant on the T2 application has been resolved on the L1 application. The Landlord conceded that the tenancy terminated on January 31, 2022 and there is, as a result, no need for the LTB to consider any claim for a rent abatement after that date-the Tenant did not pay rent after January 31, 2022 and the Landlord is not claiming rent after January 31, 2022.
36. The Tenant asserted that she was prejudiced by an adjournment because she had uploaded evidence in support of the T2 application prior to the hearing on June 2, 2023 and the Landlord was only entitled to see that evidence seven days before the hearing of the application. I explained to the Tenant that this did not result in any prejudice and evidence had to be filed a minimum of seven days before a hearing.
37. Any prejudice that might have arisen as a result of an order being made on the Landlord's application requiring that the Tenant pay money to the Landlord is, in my view, fully mitigated by directing that the Landlord not enforce the order I am making on the L1 application until the T2 application has been determined.
38. The Tenant expressed some concern that the Landlord conceding the tenancy terminated on January 31, 2023 might impact her T2 application. I took her to be referring to the limitation period for a T2 application created by subsection 29(2) of the RTA, which says that no application may be made under subsection 29(1) more than one year after the day the alleged conduct giving rise to the application occurred.
39. Any issue that might exist with the T2 application based on subsection 29(2) is not dependent on when the tenancy was terminated. The limitation period created by subsection 29(2) is based on when the T2 application was filed and not when the relevant tenancy was terminated. The Tenant should be aware, however, that the LTB will be able to provide her with a remedy based only on actions and conduct of the Landlord that took place prior to May 10, 2022-one year prior to the date the T2 application was filed. I am seized and will be able to consider this issue when I consider the T2 application.

IV. Delay in Enforcing Order Against Tenant

40. I am seized of the T2 application and will schedule it to be heard in the Fall of 2023.
41. While I have not yet heard the evidence on the T2, it is possible that the Tenant will be awarded compensation equal to, or greater than, what she owes to the Landlord. The Tenant ought to be able to set off against the rent she owes to the Landlord any

compensation the Landlord is ordered to pay. **[See *Marineland of Canada Inc. v. Olsen*, 2011 ONSC 6522 (CanLII)]**

42. On an application for arrears, the tenant may rely on section 82 of the RTA to ask that the LTB award compensation, the effect of which would be to reduce the amount owing to the landlord. **[RTA, s. 87(2)]** A tenant may also commence a stand-alone application under section 29 seeking compensation.
43. In my view, where a tenant responding to a landlord application under section 87 files a stand-alone application seeking compensation, the tenant should, where possible, be in the same position as a tenant that relies on subsection 87(2). This can be accomplished by the LTB hearing the landlord and tenant applications at the same time. In this case, that approach would have involved adjourning the Landlord's application, which would have, in my view, been unfair to the Landlord and inconsistent with the requirement that the LTB adopt the most expeditious method of determining the questions arising in a proceeding. **[RTA, s. 183]**
44. However, the LTB has jurisdiction to include in an order any conditions that it considers fair in the circumstance **[RTA, s 204(1)]** and I am directing that the Landlord take no steps to enforce this order against the Tenant until the Tenant's T2 application is determined. The effect of this is to ensure that the Tenant's right to set off any compensation against the rent she owes is preserved—she will only have to pay the net amount, if any, she owes to the Landlord.

It is ordered that:

1. The Tenant owes the Landlord shall pay to the Landlord \$7,666.00, inclusive of the filing fee.
2. The Landlord shall take no steps to enforce this order against the Tenant until LTB-T-037820-23 is determined.

July 18, 2023
Date Issued

E. Patrick Shea
Vice Chair, 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.