



Order under Section 69 Residential Tenancies Act, 2006

Citation: Marie Dioso v Matan Hershkowitz, 2023 ONLTB 45850

Date: 2023-06-23

File Number: LTB-L-020839-23

In the matter of: basement, 167 KENILWORTH AVE S HAMILTON
ON L8K2T5

Between: Herbert Dioso Landlords
Marie Dioso

And

Matan Hershkowitz Tenant

Herbert Dioso and Marie Dioso (the 'Landlords') applied for an order to terminate the tenancy and evict Matan Hershkowitz (the 'Tenant') because the Tenant did not pay the rent that the Tenant owes (L1 Application).

Herbert Dioso and Marie Dioso (the 'Landlords') also applied for an order to terminate the tenancy and evict Matan Hershkowitz (the 'Tenant') because the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlords or another tenant and the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex has wilfully or negligently caused damage to the premises.

Herbert Dioso and Marie Dioso (the 'Landlords') also applied for an order requiring Matan Hershkowitz (the 'Tenant') to pay the Landlords' reasonable out-of-pocket costs the Landlords have incurred or will incur to repair or replace undue damage to property. The damage was caused wilfully or negligently by the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex (L2 Application).

This application was heard by videoconference on June 14, 2023.

The Landlords Marie Dioso and the Tenant Matan Hershkowitz attended the hearing.

Determinations:

L1 Application

1. At the hearing the Landlords relied on oral submissions and referred to documents to support their application. The Tenant was also given an opportunity to provide submissions and evidence.
2. The Landlords served the Tenant with a valid Notice to End Tenancy Early for Nonpayment of Rent (N4 Notice). The Tenant 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.
3. As of the hearing date, the Tenant was still in possession of the rental unit.
4. The lawful rent is \$1,600.00. It is due on the 1st day of each month.
5. Based on the Monthly rent, the daily rent/compensation is \$52.60. This amount is calculated as follows: \$1,600.00 x 12, divided by 365 days.
6. The Tenant has paid \$900.00 to the Landlords since the application was filed.
7. The rent arrears owing to June 30, 2023 are \$6,500.00. This was not disputed by the Tenant.
8. The Landlords incurred costs of \$186.00 for filing the application and is entitled to reimbursement of those costs.
9. The Landlords collected a rent deposit of \$1,600.00 from the Tenant and this deposit is still being held by the Landlords. The rent deposit can only be applied to the last rental period of the tenancy if the tenancy is terminated.
10. Interest on the rent deposit, in the amount of \$16.99 is owing to the Tenant for the period from January 11, 2023 to June 14, 2023.

L2 Application

11. On March 2, 2023, the Landlords served the Tenant an N5 notice of termination. The termination date in the notice was March 23, 2023. The allegations on the N5 notice are:
 - a) On January 22, 2023, dogs were crying in the night.
 - b) On January 27, 2023, there was a smell of smoke inside the unit, coming up through the vents to the upper unit.
 - c) On, February 11, 2023, there was a smell of marijuana smoke coming up through the vents to the upper unit. The upper tenants had to close their vents to avoid the smell.

- d) Between February 12 to February 15, 2023, there was a smell of marijuana smoke and the Tenant was seen blowing.
 - e) On February 10, 2023, there was damage to the common hallway wall above the door from the basement because the Tenant was moving in furniture.
 - f) On February 28, 2023, the shared laundry dryer lint is not being cleaned out and it is full of dog hair.
12. The N5 notice also claims \$500.00 from the Tenant in order to void the notice for the damage to the hallway wall.
13. In *Ball v Metro Capital Management Inc.* [2002] OJ No 5931 (Div Ct) the Divisional Court considered subsection 43(2) of the Act and found that the purposes of requiring that a landlord provide reasons and details on a notice given pursuant to the Act was to: (a) allow the tenant to be in a position to know the case to be met before the Board; (b) allow the tenant to decide whether or not to dispute the allegations made by the landlord; and, in the case of a voidable notice, (c) allow the tenant to stop the conduct or activity or correct the omission. The Divisional Court found that, to be in compliance with subsection 43(2), a notice should include dates and times of the alleged conduct, together with a detailed description of the alleged conduct. [*Ball v Metro Capital Management Inc.* [2002] OJ No 5931 (Div Ct), paras 10 and 12.]
14. The N5 notice served on the Tenant contains no times the alleged conduct occurred. I found the Tenant, based on the N5 notice, could not know the case to be met or effectively dispute the allegations made by the Landlords. The instructions on the N5 notice clearly direct the Landlords to include the dates, times and specific details of the allegations. In my view, it would not have been a difficult task for the Landlords to have included the times the issues occurred. As a result, I found the N5 notice did not provide the Tenant sufficient details of the allegations as required by section 43(2) of the Act and it was therefore defective.
15. Additionally, the \$500.00 the Landlords claimed for damage on the N5 notice went unsubstantiated at the hearing. This amount was required to be paid by the Tenant in order to void the notice. The Landlords' evidence was that they "asked around" with a picture of the damage. The Landlords submitted a picture of the damage and it shows a single area of dented and damaged drywall. The Landlords submitted no estimates for the cost of the repair. The Landlords' evidence was the Tenant emailed them days before the hearing stating he had obtained an estimate to repair the damage in the amount of \$75.00 to \$100.00.
16. Since the Landlords provided no convincing evidence the damage to the drywall would actually cost \$500.00 to repair, I found the Tenant's evidence on this point more reliable and it was in line with what I consider to be a reasonable cost to repair the damage.
17. Because the amount given on the N5 notice to void the notice is substantially higher than the amount that the repair will actually cost, I find this part of the N5 notice to be invalid as

well. To find otherwise would be to allow landlords to inflate the cost of repairs on a voidable N5 notice in order to render it non-voidable.

18. In the application, the Landlords also claims compensation for the cost to repair the damage. Since the Tenant acknowledged he did cause the damage I find it fair to order he pay the reasonable costs to repair it. In my view, this amount is \$100.00 based on the Tenant's own evidence and what I find to be reasonable after consideration of the photograph submitted by the Landlords. This amount will be ordered.

Section 83 Considerations

19. The Landlords sought an eviction citing the significant financial impact the accumulating rent arrears have had on them. They are a small Landlords and are currently paying their own living costs as well as the mortgage on the rental property without the rental income from the Tenant.
20. The Landlord, Ms.Diosi, testified they have given the Tenant reminders each month of the rent arrears since the tenancy began in January 2023. They discussed a payment agreement with the Tenant and contacted him through text messages and emails however nothing materialized.
21. The Tenant testified he was evicted elsewhere before he moved into the rental unit. He had been staying in hotels after this eviction but could no longer afford to. His evidence was he paid first and last month's rent to the Landlords but that the rental unit was over his budget.
22. The Tenant's evidence was he is actively looking for work and that his current monthly income is less than the monthly rent. His evidence was he is hopeful the Board, on an unrelated application, will order his former landlord to pay him approximately \$6,000.00. He plans to use this money to pay the rent arrears.
23. The Tenant requested the Board order a payment plan. I did not find this was realistic as of the day of the hearing, the Tenant's monthly income could not support the monthly rent or a meaningful payment towards the rent arrears.
24. The Tenant testified he has had issues with the rental unit including problems with the oven and the time the shower's hot water takes to be at a comfortable temperature. He also mentioned there were other issues such as the floor not being level. I did not find any of the issues articulated rose to the level of a serious breach of the Landlords' obligations.
25. I asked the Tenant if there were any other circumstances he was experiencing that would make an eviction unfair. The Tenant stated he had three dogs and would need approximately eight weeks to find alternate living accommodations that would be suitable in his circumstances.
26. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), including whether the Landlords attempted to negotiate a repayment agreement with the Tenant and find that it would be

unfair to grant relief from eviction pursuant to subsection 83(1) of the Act. The Tenant was served the N4 notice in March of 2023 after moving into the unit in January 2023. His own evidence was at the time he took possession, the unit was over his budget. I find the Tenant has known from the outset of this tenancy that it was not sustainable and the service of the N4 notice would have been a clear reminder of this. In my view, the Tenant has already had substantial time to prepare for the need to find alternative living arrangements.

It is ordered that:

1. The tenancy between the Landlords and the Tenant is terminated unless the Tenant voids this order.
2. **The Tenant may void this order and continue the tenancy by paying to the Landlords or to the LTB in trust:**
 - \$6,686.00 if the payment is made on or before June 30, 2023. See Schedule 1 for the calculation of the amount owing on the L1 application.

OR

- \$8,286.00 if the payment is made on or before July 4, 2023. See Schedule 1 for the calculation of the amount owing on the L1 application.
3. The Tenant may also make a motion at the LTB to void this order under section 74(11) of the Act, if the Tenant has paid the full amount owing as ordered plus any additional rent that became due after July 4, 2023 but before the Court Enforcement Office (Sheriff) enforces the eviction. The Tenant may only make this motion once during the tenancy.
 4. **If the Tenant does not pay the amount required to void this order the Tenant must move out of the rental unit on or before July 4, 2023**
 5. If the Tenant does not void the order, the Tenant shall pay to the Landlords \$4,205.41. This amount includes rent arrears owing up to the date of the hearing and the cost of filing the application. The rent deposit and interest the Landlords owe on the rent deposit are deducted from the amount owing by the Tenant. See Schedule 1 for the calculation of the amount owing on the L1 application.
 6. The Tenant shall also pay the Landlords compensation of \$52.60 per day for the use of the unit starting June 15, 2023 until the date the Tenant moves out of the unit.
 7. Pursuant to the L2 application, the Tenant shall also pay to the Landlords the amount of \$100.00 for the cost to repair the damage to the drywall.
 8. If the Tenant does not pay the Landlords the full amount owing on or before July 4, 2023, the Tenant will start to owe interest. This will be simple interest calculated from July 5, 2023 at 6.00% annually on the balance outstanding.

9. The Landlords or the Tenant shall pay to the other any sum of money that is owed as a result of this order.
10. If the unit is not vacated on or before July 4, 2023, then starting July 5, 2023, the Landlords may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
11. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlords on or after July 5, 2023.

June 23, 2023

Date Issued

John Cashmore

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.

In accordance with section 81 of the Act, the part of this order relating to the eviction expires on January 5, 2024 if the order has not been filed on or before this date with the Court Enforcement Office (Sheriff) that has territorial jurisdiction where the rental unit is located.

Schedule 1
SUMMARY OF CALCULATIONS

A. Amount the Tenant must pay to void the eviction order and continue the tenancy if the payment is made on or before June 30, 2023

Rent Owing To June 30, 2023	\$7,400.00
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlords since the application was filed	- \$900.00
Total the Tenant must pay to continue the tenancy	\$6,686.00

B. Amount the Tenant must pay to void the eviction order and continue the tenancy if the payment is made on or before July 4, 2023

Rent Owing To July 31, 2023	\$9,000.00
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlords since the application was filed	- \$900.00
Total the Tenant must pay to continue the tenancy	\$8,286.00

C. Amount the Tenant must pay if the tenancy is terminated

Rent Owing To Hearing Date	\$6,536.40
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlords since the application was filed	- \$900.00
Less the amount of the last month's rent deposit	- \$1,600.00
Less the amount of the interest on the last month's rent deposit	- \$16.99
Total amount owing to the Landlords	\$4,205.41
Plus daily compensation owing for each day of occupation starting June 15, 2023	\$52.60 (per day)