



**Order under Section 77(8)
Residential Tenancies Act, 2006**

Citation: Hazelview Properties v Alluker, 2023 ONLTB 66782

Date: 2023-10-16

File Number: LTB-L-054552-23-SA

In the matter of: 1001, 2870 CEDARWOOD DR
Ottawa ON K1V8Y5

etween: Hazelview Properties Landlord

And

Margaret Alluker Tenant

Hazelview Properties (the 'Landlord') applied for an order to terminate the tenancy and evict Margaret Alluker (the 'Tenant') because the Tenant did not meet a condition specified in the order issued by the LTB on July 10, 2023 with respect to application LTB-L-013222-23.

The Landlord's application was resolved by order LTB-L-054552-23, issued on July 28, 2023. This order was issued without a hearing being held.

The Tenant filed a motion to set aside order LTB-L-054552-23 and for a stay of the order.

The motion was heard by videoconference on September 20, 2023.

The Landlord's agents A. Godine and S. Perrault, the Landlord's Legal Representative Allan Kouri and the Tenant attended the hearing. The Tenant spoke with Duty Counsel prior to the hearing. Duty Counsel Melissa Bramson assisted the Tenant during the hearing.

Determinations:

1. After considering all of the circumstances, I find that it would not be unfair to set aside order LTB-L-054552-23.
2. Order LTB-L-013222-23 provides that the Landlord can apply to the LTB under section 78 of the *Residential Tenancies Act, 2006* (the 'Act') without notice to the Tenant to terminate the tenancy and evict the Tenant if the Tenant does not meet certain condition(s) in the order.
3. On July 11, 2023, the Landlord applied to the LTB to terminate the tenancy by way of an L4 application because the Tenant failed to pay the July 1, 2023 rent in full and on time. The Landlord obtained an ex parte order, issued on July 28, 2023, terminating the tenancy and evicting the Tenant. The Tenant seeks to set aside the order.
4. The Tenant's Legal Representative M.B. submits that the L4 application should be dismissed on a preliminary basis, because the Tenant did not

effectively breach the order and as a result of the Landlord's alleged improper conduct after the L4 application was filed.

5. The Landlord's Legal Representative A.K. asks the Board to dismiss the Tenant's preliminary motion and proceed to a hearing of the L4 application on the merits.

Preliminary Issues

The Landlord submits that the Tenant's motion is deficient

6. The Landlord's Legal Representative A.K. submits that the motion filed by the Tenant was exceedingly vague, failing to provide clear grounds for the motion.
7. The motion simply states that the Tenant disagrees with the eviction order and wishes to have a hearing about "issues" and payments made. He maintains that, absent sufficient detail about the reason for bringing the motion and supporting evidence, the motion cannot succeed.
8. The Tenant's Legal Representative M.B. presented an email from the Landlord's employee A.G. to the Tenant, dated July 11, 2023. It was sent to the Tenant right after the L4 was filed and contained an offer to resolve the breach, which the Tenant accepted. This was the reason for the motion.
9. A.K. pointed out that if the Tenant intended to rely upon the email as evidence that there was no breach, or that the order should be set aside because the breach was resolved, the Tenant ought to have disclosed the email to the Landlord and to the Board before this hearing.
10. He stated that the Tenant had received the email three weeks prior to filing the motion and added that the Tenant did not disclose the email even after receiving the Landlord's disclosure package on September 15, 2023.
11. When asked why the Landlord had not previously disclosed the email to the Tenant and to the Board, given that the Landlord's employee was the author, A.K. indicated that he was not retained at the time the L4 was filed. He only became aware of the email at this hearing.
12. A.G., the Landlord's regional administrator, did not explain during her testimony why she did not promptly submit the email to the Board after filing the L4 or in advance of the hearing of this motion.

The Tenant claims that the breach was resolved

13. M.B. claims that the contract between the parties after the L4 was filed was satisfactory proof that the Tenant did not breach the conditional order. Therefore, the L4 ought to be dismissed on a preliminary, or summary, basis.
14. She points to A.G.'s email to the Tenant as evidence of the agreement. I allowed the document to be admitted at the hearing as it would not result in significant prejudice to either party.
15. M.B. introduced the relevant part of the email, which states:

"Your payment on July 7th was both late and less than your full rent. ... We would like to offer you the opportunity to act quickly to correct the shortfall of \$36.72. If you pay it on or before this Friday, July 14th,

we will withdraw the LTB application preserving your tenancy. We would emphasize that this is voluntary on our part and a one time gesture. Going forward, the LTB order payment schedule must be observed and we will not accommodate short or late payments. We hope this is helpful. ...”

16. There is no dispute that the Tenant accepted the offer and paid \$37.00 to the Landlord. The Tenant submits that she paid on July 11, 2023 but the Landlord posted the payment in the rent ledger on July 14, 2023. In any event, the parties agree that the amount required was paid in full and by July 14, 2023.
17. M.B. submits that the Tenant relied upon the Landlord to withdraw the L4 as agreed. However, the Landlord did not withdraw the application.

Decision on the Preliminary Issues

Was the Tenant's motion deficient?

18. I denied the Landlord's request to dismiss the Tenant's preliminary and substantive motions.
19. A motion to set aside an order is different than an application. While applications must contain adequate detail for the responding party to be able to present a fulsome defence, a set aside motion is not necessarily limited by the same procedural rule.
20. I say this because the time frame for filing a motion after the receipt of an ex parte order is short. It is not uncommon for tenants to be unable to consult with, and retain, a legal representative within that time frame. Most often they complete the forms themselves. They may face technological and other barriers to choosing and filing relevant documents in support of their motion.
21. The ex parte order was issued on July 28, 2023. That was when the Tenant became aware that the Landlord did not withdraw the L4 but had proceeded to obtain an eviction order. The Tenant reasonably filed the motion one week later, on August 4, 2023. The Tenant was self-representing when she filed her motion.
22. Neither party submitted a copy of the Landlord's email to the Board before this hearing. Despite this, I am satisfied that the Landlord, the author of the email, could have reasonably concluded that the Tenant thought the Landlord's L4 was resolved based on the content of the email.

The substance of the Tenant's motion to set aside the order

23. It is undisputed that the Tenant breached the conditional order. She failed to pay the rent in full and on or before July 1, 2023. The breach triggered section 78 of the Act under the consent order. The Landlord was entitled to file the L4 application.
24. The parties' side agreement did not change the fact that the Tenant breached the order. It is the Landlord's purported failure to abide by the terms of the agreement reached after filing the L4 that forms the substance of the Tenant's motion.

25. I find that the issue about whether the breach was effectively resolved after the L4 was filed is relevant to the Board's determination about whether it would not be unfair to set aside the order pursuant to subsection 78(11) of the Act.

The Parties' Interpretation of the Landlord's July 11, 2023 Email to the Tenant

26. The parties agreed that the Board must determine the proper interpretation of the Landlord's email to the Tenant dated July 11, 2023.
27. A.K., on behalf of the Landlord, asserts that the email is clear and unambiguous. He submits that the Landlord expected the Tenant to comply with all future payments in the payment plan before the Landlord would withdraw the application.
28. The Landlord's regional administrator A.G. testified that they were withholding withdrawing the L4 because the Landlord would not be "adhering to any late payments or offering any more extensions" and that that going forward, the LTB payment plan "must be observed and they would not accommodate late or short payments".
29. She stated that, based on "advice", she and regional administrator S.P. were waiting to see if the Tenant made the next scheduled payment on July 25, 2023. From whom they obtained advice was not disclosed- it was not from A.K., because he was not retained at the time.
30. A.G. maintained that the Tenant was mistaken in her belief that they would withdraw the application after the Tenant paid the \$36.72 as agreed. She was adamant that her email was unambiguous.
31. When asked on cross-examination to point to the wording in the email which states that the Landlord will wait for the next payment before withdrawing, A.G. indirectly responded that "it was up to interpretation".
32. As I understand it, the Landlord's reason for declining to withdraw the L4 was that their offer did not rest solely upon accepting the singular payment of \$36.72. The implication was that the email constituted a conditional offer to the Tenant.
33. The Landlord alleges that the Tenant failed to pay the July 25, 2023 instalment as required. A.G. rationalized that, as a result, they were not obliged to withdraw the application.
34. M.B., for the Tenant, submits that the Landlord's interpretation has no merit. She argued that when reading the email a reasonable person would not understand that the Landlord's offer was conditional upon the Tenant making future payments as ordered.
35. She asserts that the Landlord misled the Tenant. By proceeding to obtain an ex parte order, the Landlord's insincere conduct exposed the Tenant to an unlawful termination of the tenancy and eviction.

Setting Aside the Order: Fairness Considerations

36. As explained below, having regard to all of the circumstances, I find it would not be unfair to set aside the order.

37. I did not need to hear evidence with respect to the context of the Tenant's breach to determine whether, pursuant to subsection 78(11) of Act, the ex parte order should be set aside. The fairness principle does not, in this case, relate to the Tenant's circumstances. To the contrary, it is evident that the Landlord did not act fairly towards the Tenant.
38. I find that there was no ambiguity in the Landlord's email. Completely absent is any wording describing the offer being conditional upon the Tenant paying the next instalment, or all instalments, in the payment plan in full and on time.
39. The Landlord's account does not withstand scrutiny. I find that the Landlord did not discharge the burden of proving that the contract was so unambiguous that there was no room for misunderstanding.
40. The Landlord made a well-defined offer to the Tenant and the Tenant accepted the offer. The Tenant made payment to the Landlord in exchange for the Landlord withdrawing the L4 ('consideration' in contemplation of the withdrawal). The Landlord did not follow through with their end of the bargain.
41. I might have accepted A.G.'s own interpretation of her email had she or S.L. taken reasonable steps after receiving the agreed upon payment to confirm the arrangement with the Tenant. For example, they could have reminded the Tenant in writing that they would withdraw the L4 if the Tenant paid all future payments in full and on time. No evidence was led by the Landlord in that regard.
42. Even so, the contract itself was not without problems, which I will address below. Objectively viewed, I am satisfied that the Tenant reasonably expected the Landlord to withdraw the L4 after she paid \$36.72 pursuant to the agreement.
43. The Tenant's payment was sufficient to make up the balance that was supposed to be paid on July 1, 2023. The Tenant paid the rest of July's rent on or before the date that she was required to pay it, which was July 14, 2023. The Landlord was then obligated, but failed, to withdraw the L4. This was highly unfair to the Tenant.
44. This motion is all about fairness. Just as the Tenant was bound to follow the terms of the conditional order, the Landlord was bound to comply with the agreed upon conditions in the subsequent agreement.
45. There are other troubling components to this case which merit comment.

Suspension of the L4 Application

46. Perhaps it was the Landlord's intention to withdraw the application after the Tenant paid the July 25, 2023 instalment. If so, it would appear that the Landlord gambled with the issuance date of the anticipated ex parte order. It was mere speculation by the Landlord that the section 78 order would be issued after July 25, 2023.
47. A.G.'s evidence implies that the Landlord chose to suspend the L4 pending further payments by the Tenant. The regional administrators could revisit the L4 to decide whether to withdraw following each subsequent payment date set out in the consent order.

48. It is apparent that the Landlord used a 'carrot and stick' approach. The stick was the threat of eviction under the already filed L4 as a punitive measure in the case of a future breach. The carrot in this context would be the reward of withdrawing the L4 and preserving the tenancy if the Tenant makes all payments as ordered.
49. However, an L4 cannot be paused to wait for a tenant to make future payments. The landlord must either commit to the content of the L4 as filed or withdraw the application and reapply in respect of future breaches that occur. That is because an ex parte order is based only upon the breach(es) declared by the landlord in the application.
50. The parties having revised the July 1, 2023 payment date to July 14, 2023 on consent, the Landlord was effectively forgiving the Tenant's initial breach. The Landlord could not then rely upon the July 1, 2023 breach in the L4. By agreement, that date was no longer actionable by the Landlord. Further, July 25, 2023 was not the date of the breach declared in the L4. The Board could not terminate the tenancy and evict the Tenant based on that breach.
51. The Landlord did not refer to any provision in the Act which permits a landlord to hold the threat of an eviction under a section 78 application over a tenant indefinitely.

The Landlord's misrepresentation to the Board

52. After filing the L4 and making the offer to the Tenant, the Landlord did not take any steps to inform the Board of the agreement or that the balance owing from July 1, 2023 had been paid by the date consented to by the parties. The Landlord did not explain or clarify why it failed to submit the email to the Board in a timely way.
53. The principle of disclosure means that applicants must disclose all relevant evidence to the Board, whether helpful or harmful to their case. It is particularly important where an applicant landlord seeks to dispossess a respondent tenant of their home.
54. In my view, it was an abuse of the LTB process for the Landlord to persist in pursuing a termination of the tenancy under the L4. The Landlord misrepresented the circumstances to the Board and, by not informing the Board of the contract, misled the Board. Consequently, the Board terminated the tenancy based on that misrepresentation when in fact the Landlord had no legal basis upon which to continue with the L4.
55. The Tenant, no doubt distressed, was then put to the task of having to file a motion to set aside the order and to attend a needless hearing which, I add, was an inefficient use of the Board's scarce resources.

Costs

56. Pursuant to the Board's Interpretation Guideline #3, the Board has the discretion to require a party to pay Board costs if the party engages in conduct that is unreasonable and causes undue expense or delay.
57. The Landlord's conduct was clearly unreasonable. However, I informed the parties that I was disinclined to consider costs. That is because I am not

persuaded that the regional administrators intended to act in an underhanded manner or in bad faith. There is no doubt that A.G. and S.P. had good intentions and wished to give the Tenant a financial break.

58. I believe they were misguided and truly misconstrued their legal obligations and the LTB process. I attribute any fault to the Landlord, who failed to ensure that decisions their employees make which directly impact a tenant's security of tenancy are reviewed by a legal professional, or similarly qualified person, to discover and correct errors before the decision is taken.

59. That is not to say that landlords should be discouraged from making offers to tenants to resolve arrears of rent. They must, though, take painstaking care to craft offers that are fair, are precisely worded and comply with contract law.

60. Based on the evidence and submissions before the Board and having regard to all of the circumstances, I am satisfied that it would not be unfair to set aside the ex parte order.

It is ordered that:

1. The motion to set aside Order LTB-L-054552-23, issued on July 28, 2023, is granted.
2. Order LTB-L-054552-23 is set aside and cannot be enforced.
3. The Landlord's L4 application is dismissed.

October 16, 2023

Date Issued

Elle Venhola

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.