



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

Citation: 10467103 Canada Inc. v Weinkauf, 2023 ONLTB 23581

Date: 2023-03-08

File Number: LTB-L-029715-22

In the matter of: 1104, 2944 BASELINE RD
NEPEAN ON K2H7T3

Between: 10467103 Canada Inc. Landlord

And

Dakota Jessie-Anne Allard Tenants
Sean Daniel
Dean Weinkauf

10467103 Canada Inc. (the 'Landlord') applied for an order to terminate the tenancy and evict Dakota Jessie-Anne Allard, Sean Daniel and Dean Weinkauf (the 'Tenants') because the Tenants did not pay the rent that the Tenants owe.

This application was heard by videoconference on January 18, 2023 at 1:00 p.m.

The Landlord, represented by Roxanne Lacroix, an employee, and the Tenants, Dakota JessieAnne Allard and Sean Daniel Dean Weinkauf, attended the hearing.

Determinations:

1. The Landlord served the Tenants with a valid Notice to End Tenancy Early for Nonpayment of Rent (N4 Notice). The Tenants 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.
2. As of the hearing date, the Tenants were still in possession of the rental unit.
3. The lawful rent is \$2,085.00 which broken down as follows; \$1,935.00 per month for the unit rental and \$150.00 per month for a parking spot. It is due on the 1st day of each month.

4. As agreed at the onset of the lease, and as confirmed by an attachment of the lease submitted by the Tenants, the Tenants are to receive a “rent promotion/rebate” of \$500.00 a month for a period of 12 months commencing March 1, 2022. The discount was described as being provided due to “inconveniences occurring during the ongoing construction project (restricted access to common areas, unfinished building, noise, and traffic on site)”. The Tenants agreed and electronically signed the attachment on November 5, 2021.
5. After the application was filed, the Tenant received a credit of \$5,500.00 for the period of March 1, 2022 to January 31, 2023.
6. Based on the Monthly rent, the daily rent/compensation is \$52.11 for the period ending February 28, 2023. This amount is calculated as follows: \$1,585.00 x 12, divided by 365 days. The daily rent/compensation March 1, 2023 is \$68.55. This amount is calculated as follows: \$2,085.00 x 12, divided by 365 days.
7. There is no last month's rent deposit.
8. The Tenant has paid \$12,680.00 to the Landlord since the application was filed.
9. The parties agree that rent arrears owing to January 31, 2023 are \$2,783.00, after application of the \$5,500.00 credit.
10. The Landlord incurred costs of \$186.00 for filing the application and is entitled to reimbursement of those costs.

Section 82

11. The Tenants provided the required disclosure to raise issues under section 82(1) of the *Residential Tenancies Act, 2006* (“Act”). The specific issues are as follows:
 - I. Tenants’ evidence: A gap of exceeding 5 inches between the glass panel and the wall – this issue started on March 1, 2022 and was reported to the Landlord on March 1, 2022

Landlord’s evidence: The Landlord’s representative agreed that the gap is 5 inches however does not present a hazard. The Tenant also submitted that when they initially moved in the balcony door was bolted shut however, they themselves removed the bolts granting access and did not let the Landlord know.
 - II. Tenants’ evidence: Worker walked into their unit while they were sleeping, as he did not know the unit was occupied – this occurred on March 22, 2022 and was reported to the Landlord May 11, 2022

Landlord’s evidence: The Landlord’s representative submitted that this was a new building still under construction. Door numbers were not posted on the doors.

Furthermore as per the Tenant's own submission once the Landlord was apprised of the issue, they took corrective action by posting a notice on their door advising that the unit was occupied in order to prevent another incident.

- III. Tenants' evidence: Move in date was set for February 28, 2022 however when the Tenants arrived at the rental complex their unit was not ready and they could not move-in.

Landlord's evidence: The Landlord's representative responded to the Tenant's concern submitting that the local building authority did not complete their inspection of the unit as scheduled. Furthermore, as submitted by the Tenants they were reimbursed for the delay and any additional costs associated with moving and alternative accommodation.

- IV. Tenants' evidence: Fire alarm system was "off" and then was sounding intermittently while testing - the Building Manager was contacted and confirmed that it was not a real fire and that the fire alarm system was turned off by mistake – this occurred on April 20, 2022 and was reported to the Landlord on April 20, 2022.

Landlord's evidence: The Landlord's representative submitted that this was a new construction building which required installing and adjusting fire panels by contractors.

- V. Tenants' evidence: On-going construction that the Tenant were not made aware of throughout the building as well as another building being constructed in front of the Tenants' balcony with a large crane operating every morning which was disruptive. The Tenants advise that this was mentioned by the leasing agent however downplayed as not beginning for three years – from the onset of the tenancy and reported to the Landlord in April 2022

Landlord's evidence: The Landlord's representative submitted that this was a new building still under construction and that the building next door was also under construction, that there was a visible "hole in the ground." The Landlord's representative stated that is why the Tenants were provided with a \$500.00 reduction in rent from the start of the tenancy – to compensate them for inconveniences incurred while construction was ongoing.

- VI. Tenants' evidence: Hazardous material laying in the hallways and elevator such as razor blades, dust, construction equipment and very strong paint smells – this began at the onset of the tenancy and was reported on February 28, 2022.

Landlord's evidence: The Landlord's representative reiterated the Landlord's position that this was a new building still under construction and the reason why the

Tenants were provided with a \$500.00 reduction in rent from the start of the tenancy – to compensate them for inconveniences incurred while construction was ongoing.

- VII. Tenants' evidence: The Landlord was unresponsive to emails from initial email complaint on March 1, 2022 with follow-up on May 10th and 11th, 2022 as well as August 10th, as well as text emails on May 5th, 9th, 10th, 11th, and 18th.

Landlord's evidence: The Landlord relied for the most part on the Tenant's own submissions. I note that on May 11, 2022 this was a response email from Sandy Poulot. There is another mail from Brigil dated June 8, 2022 as well as on August 10, 2022 and August 15, August 16, August 17 and August 18, 2022

12. Additional undisputed facts:

- a) The residential complex was a brand new building at the beginning of the tenancy;
- b) The building had not been completed and had ongoing construction when the tenancy began;
- c) The Tenants assumed occupancy as permitted by local building authorities;
- d) There was a pre move-in agreement to compensate the Tenants for inconveniences and or loss of use as a result of the ongoing construction; and
- e) The Landlord has already compensated the Tenants for expenses incurred as a result of the delay in moving including costs for movers and a hotel stay.

13. The Tenants are seeking an abatement of rent for 2 months, for March and April 2022, or \$2,969.00, essentially what is being claimed in the L1/L9 and as well as a termination of tenancy.

Analysis

14. Section 20 of the *Residential Tenancies Act, 2006* (the "Act") states:

20 (1) A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.

(2) Subsection (1) applies even if the tenant was aware of a state of non-repair or a contravention of a standard before entering into the tenancy agreement.

15. In *Onyskiw v. CJM Property Management Ltd.*, 2016 ONCA 477, the Court of Appeal held that it is necessary to take a contextual approach to determining whether a landlord has breached its maintenance obligations under section 20(1) of the Act and a landlord will not be found liable for such a breach if the landlord responded to the maintenance issue reasonably in the circumstances.

16. Applying this test to the circumstances here I am satisfied on the balance of probabilities that while the Landlord failed to ensure that the rental unit complied with health, safety, housing or maintenance standards at the beginning of the tenancy while the construction was ongoing, the Tenants have already been reasonably compensated for the inconvenience they experienced and their out-of-pocket expenses.
17. There is no dispute that there were deficiencies and that Landlord and the Tenant were aware of them prior to the move-in by Tenants
18. Testimony received from the Landlord's representative was that the Landlord received an occupancy permit to allow the Tenants to move-in subject to ongoing correction of building deficiencies and adjustments. No rebuttal evidence or documentation was received to contest that the Landlord had not received substantial compliance which allowed for the Tenants to move into the building and rental unit.
19. The Landlord effectively acknowledged that the rental unit was not completed when the tenancy began by pro-actively addressing the potential deficiencies in advance via the pre move-in agreement that provides the Tenants with a \$500.00 monthly discount, representing approximately 28% of the rent, for "inconveniences occurring during the ongoing construction project (restricted access to common areas, unfinished building, noise, and traffic on site)".
20. In reaching my determination I have considered that the Tenants were clearly aware and could see that they were moving into a new building still under construction. Furthermore in their own submission they signed the "Lease Annex-Promotion/Rebate-36 month lease" which provided them with \$500.00 per month "as compensation for inconveniences occurring during the ongoing construction project (restricted access to common areas, unfinished building, noise, and traffic on the site.)" for the first 12 months.
21. In addition, as acknowledged by the Tenants, the Landlords have already re-imbursed the Tenants for any expenses associated with the delay in moving into the rental unit.
22. I also refer to the evidence submitted by the Tenants themselves, with respect to the Tenants' claims that the Landlord was unresponsive to their communications. However in their own submissions they state, for example in deficiency item 7, that there was an initial complaint on March 1st, with follow-up on May 10th and 11th, 2022 as well as August 10th, there was also text emails on May 5th, 9th, 10th, 11th, and 18th.

However the Tenant's own submission states the contrary. I note that on May 11, 2022 there was a response email from Sandy Poulot, one of the Landlord's staff. As well, there are additional emails from Brigil dated June 8, 2022 as well as on August 10, 2022 and August 15, August 16, August 17 and August 18, 2022

These series of emails between the parties in May and August 2022 entered into evidence by the Tenants also indicate that the Landlords were attempting to address the Tenant's concerns, albeit perhaps not in whole, and not as timely as would have ideally been the case.

23. For these reasons I am dismissing the Tenants' section 82 claims.

Relief from eviction

24. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), including the impact of COVID-19 on the parties and whether the Landlord 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 Tenants did not seek relief from eviction and in fact requested to have the lease terminated.

It is ordered that:

1. The tenancy between the Landlord 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 Landlord or to the LTB in trust:**
 - **\$5,054.00** if the payment is made on or before March 19, 2023. See Schedule 1 for the calculation of the amount owing.
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 March 19, 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 March 19, 2023**
5. If the Tenant does not void the order, the Tenant shall pay to the Landlord \$2,343.68. This amount includes rent arrears owing up to the date of the hearing and the cost of filing the application. See Schedule 1 for the calculation of the amount owing.
6. The Tenant shall also pay the Landlord compensation of \$52.11 per day for the use of the unit starting January 19, 2023 until January 31, 2023 and then \$68.5 per day until the date the Tenant moves out of the unit.
7. If the Tenant does not pay the Landlord the full amount owing on or before March 19, 2023, the Tenant will start to owe interest. This will be simple interest calculated from March 20, 2023 at 5.00% annually on the balance outstanding.

8. The Landlord or the Tenant shall pay to the other any sum of money that is owed as a result of this order.
9. If the unit is not vacated on or before March 19, 2023, then starting March 20, 2023, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
10. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlord on or after March 20, 2023.

March 8, 2023

Date Issued

 Peter Pavlovic
 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 September 20, 2023 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 March 19, 2023

Rent Owing To March 31, 2023	\$4,868.00
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount of the last month's rent deposit	\$0.00
Total the Tenants must pay to continue the tenancy	\$5,054.00
The monthly rent the Tenant must pay to continue the tenancy April 1, 2023 onwards	\$2,085.00

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

Rent Owing To Hearing Date	\$2,157.68
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid into the LTB since the application was filed	- \$0.00

Less the amount of the last month's rent deposit	- \$0.00
Total amount owing to the Landlord	\$2,343.68
Plus daily compensation owing for each day of occupation starting <u>January 19, 2023 to January 31, 2023 only</u>	\$52.11 (per day)