



**Order under Section 21.2 of the
Statutory Powers Procedure Act
and the Residential Tenancies Act, 2006**

Citation: Kethesvaran v Elliott, 2022 ONLTB 14258

Date: 2022-12-16

File Number: LTB-L-000680-21-RV2

In the matter of: Basement, 271 JOHN TABOR TRAIL
Scarborough ON M1B2R8

Between: Rasiah Kethesvaran Landlord

And

Mary Elliott Tenant

Review Order

Rasiah Kethesvaran (the 'Landlord') applied for an order to terminate the tenancy and evict Mary Elliott (the 'Tenant') because:

- the Tenant did not pay the rent that the Tenant owes (L1 application)
- 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 Landlord or another tenant (L2 application)

This application was heard on June 14, 2022 and on August 24, 2022 and resolved by order LTB-L-000680-21 issued on August 26, 2022.

On September 25, 2022, the Landlord requested a review of the order alleging that the order contained a serious error or that a serious error occurred in the proceeding.

On September 27, 2022 interim order LTB-L-00680-21-RV-IN was issued, staying the order issued on August 26, 2022.

The request for review was heard by videoconference on October 19, 2022. Only the Tenant, and the Tenant's legal representative, K. Laforest, attended the hearing. On October 21, 2022 order LTB-L-000680-21-RV was issued dismissing the Landlord's request as abandoned.

On October 25, 2022 the Landlord requested a review of the order issued on October 21, 2022 alleging that they were not reasonably able to participate in the hearing.

On November 4, 2022 LTB-L-000680-21-RV2-IN was issued, staying the order issued on October 21, 2022.

These requests were heard by way of videoconference on December 5, 2022. The Landlord attended the hearing and was represented by Constantine Basis, paralegal. The Tenant attended the hearing and was represented by Kevin Laforest, counsel.

Determinations: Review Request:

Not reasonably able to participate (second review):

1. The Landlord testified that neither they nor their legal representative received notice of the review hearing for October 19, 2022.
2. The Board's records show that on September 28, 2022 notice of hearing was emailed to the parties. The Landlord's legal representative was not included on this email, the Landlord was, but maintains the position that he did not receive the notice, nor was notice of hearing brought to his attention.
3. Based on the submissions before the Board, I find on a balance of probabilities that the Landlord was not reasonably able to participate in the review hearing on October 19, 2022. The Board's records show that the Landlord attended the original hearing on June 14, 2022 and the reconvened hearing on August 24, 2022. It is clear that the Landlord had an interest in participating in the proceeding and further filed a request to review the original order issued on August 26, 2022.
4. While it is unclear as to what happened with the email sent to the Landlord with the notice of hearing, I see no reason as to why the Landlord would not want to participate in the review hearing and would not attend the hearing on the scheduled date.
5. As such, the request to review order LTB-L-000680-21-RV is granted. That order is therefore cancelled and a new (de novo) review hearing was held to consider the Landlord's review filed on September 25, 2022 alleging that the original order issued on August 26, 2022 contains a serious error by not including a section 78 clause in the order.

Serious error (first review):

6. By way of background, the parties were first before the Board on June 14, 2022. The Landlord was self-represented and the Tenant was represented by counsel. The parties requested that the Board issue an order on consent. The requested consent required the Tenant to pay \$15,500.00 by July 11, 2022. There was no mention of a section 78 clause being included in the order.
7. On July 7, 2022, the presiding member issued an endorsement reconvening the matter to hear additional submissions by the parties. The reconvened hearing was heard on August 24, 2022. The Landlord attended and was self-represented. The Tenant was present and represented by counsel.
8. At the reconvened hearing, the member asked the parties to confirm whether they would be consenting to a section 78 clause in the order. The Landlord confirmed that at the June 7, 2022 hearing, the parties did not discuss a section 78 clause prior to requesting the consent order and further stated that he did not know what a section 78 clause was until the date of the reconvened hearing. The member explained section 78 of the Act to the

Landlord, who then confirmed that he wanted to have this clause included in the consent order.

9. At the reconvened hearing, the Tenant's representative argued that the Board should issue the consent order agreed to on June 7, 2022 and not allow the Landlord to renegotiate the terms originally agreed to. After considering the submissions of the parties, the member advised the Landlord that he could not include a section 78 clause on the order.
10. In my view, the order issued on August 26, 2022 contains a serious error by being issued on consent and by not containing a section 78 clause. The order states "the parties agree that the order will not contain a section 78 clause". I have listened to the recordings from both hearing dates and the Landlord stated on more than one occasion at the reconvened hearing that he wanted a section 78 clause included. As such, I find that the Board did not have consent of the parties to issue this order.
11. The Board's records are clear that the parties made no reference to a section 78 clause at the initial hearing, which prompted the presiding member to reconvene the matter and confirm with the parties that a section 78 clause would not be included. At the reconvened hearing, the Landlord made it clear that upon understanding the application of this section of the Act, that he wanted it to form part of the consent order.
12. I agree with the Tenant's legal representative that a section 78 clause does not automatically apply to a consent order issued by the Board. However, in this case, the Landlord requested that a section 78 clause be included at the reconvened hearing. As such, I find that there was no consent of the parties at this point and the order should not have been issued on consent to include no section 78 provision.
13. I also find that the member erred by accepting the Tenant's argument that the Board should not consider the Landlord's submissions at the reconvened hearing and rely on the proposed terms at the original hearing date. The sole purpose of the reconvened hearing was to hear additional submissions from the parties respecting the terms of the consent order and as such, those submissions must be considered before issuing a final order. I further note that no order was issued after the initial hearing on June 7, 2022. As such, the Board had the authority to reconvene the matter and consider additional submissions from the parties prior to issuing a final order.
14. Therefore, the Landlord's request to review the order issued on August 26, 2022 is granted because the order contains a serious error and a new hearing was held for the Landlord's application.

Determinations: L2 application:

15. At the hearing, the Landlord requested that the L2 application be withdrawn. In accordance with subsection 200(4) of the Act, I consent to the withdrawal of the application.

Determinations: L1 application:Preliminary issue:

16. The Tenant's representative raised a preliminary concern regarding the validity of the Landlord's N4 notice of termination. The N4 notice was served on November 2, 2022 with a termination date of November 16, 2022. The N4 notice alleges that the Tenant owes \$3,100.00 in arrears of rent owing to November 30, 2022.
17. Page 2 of the N4 notice provides a breakdown of the arrears of rent owing. On this page, the Landlord listed rent charged for the months of October and November 2022 in the amount of \$1,550.00 per month. The Landlord also listed that no payments were made for these months. The N4 however does not indicate the "total rent owing" on the second page of the notice.
18. At the hearing, the Tenant confirmed that she not only understood that she owed rent for the months of October and November 2022 (\$3,100.00), but that the N4 she received had the subtotal amount handwritten on page 2 of the notice. The Landlord confirmed that he did not upload the version with hand-written subtotal to the Tribunals Ontario Portal (TOP).
19. In my view, the Landlord's N4 notice substantially complies with the requirements of section 59(2) of the Act and as such, is a valid notice. Although the N4 does not state the total amount owed on page 2 of the notice, this page is explicitly clear that the Landlord is claiming rent for the months of October and November 2022 at \$1,550.00 per each month. I also note that page 1 of the N4 notice states that the Tenant is required to pay \$3,100.00 to void the notice and that the Tenant confirmed that she received a copy of the notice containing the handwritten subtotal on page 2 of the notice and that she understood that she was required to pay \$3,100.00 on or before November 16, 2022 to void the notice.
20. As such I find that the notice is clear and not confusing to either the Tenant or the Board.

Arrears of rent:

21. The Landlord served the Tenant with a valid Notice to End Tenancy Early for Non-payment 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.
22. As of the hearing date, the Tenant was still in possession of the rental unit.
23. The lawful rent is \$1,550.00. It is due on the 1st day of each month.
24. Based on the Monthly rent, the daily rent/compensation is \$50.96. This amount is calculated as follows: \$1,550.00 x 12, divided by 365 days.
25. The Tenant has not made any payments since the application was filed.
26. The rent arrears owing to December 31, 2022 are \$23,250.00.

27. The Landlord incurred costs of \$186.00 for filing the application and is entitled to reimbursement of those costs.
28. The Landlord collected a rent deposit of \$1,550.00 from the Tenant and this deposit is still being held by the Landlord. The rent deposit can only be applied to the last rental period of the tenancy if the tenancy is terminated.
29. Interest on the rent deposit, in the amount of \$19.77 is owing to the Tenant for the period from November 13, 2020 to December 5, 2022.

Relief from eviction:

30. 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 not be unfair to postpone the eviction until January 31, 2023 pursuant to subsection 83(1)(b) of the Act.
31. The arrears of rent are substantial, and the Tenant has made no good-faith payments since the application was filed on December 17, 2021. The Landlord is a non-corporate entity who relies on the rental income to pay the mortgage and taxes on the rental property.
32. At the hearing, the Tenant did not propose a concrete repayment plan for the Board to consider and stated that she was advised to not make any payments until the matter was resolved before the Board. The Tenant has since invested the money into a mutual funds account through her bank.
33. I further note that although the matter is being heard de novo due to an error in the prior proceedings, I find that it is appropriate to still consider the overall conduct of the Tenant who was previously before the Board and agreed to pay to the Landlord the arrears of rent owing by a specific date, but has since failed to make any payments to the Landlord or the Board in trust.
34. At the hearing the Tenant testified that she is on a fixed income, experiencing health concerns and is also providing care for her special needs brother. As such, I find it would not be unfair to delay eviction to allow the Tenant some additional time to pay the arrears in full or find alternate housing.

It is ordered that:

1. The request to review order LTB-L-000680-21 issued on August 26, 2022 is granted. The order is cancelled and replaced with this order.
2. The tenancy between the Landlord and the Tenant is terminated unless the Tenant voids this order.

3. The Tenant may void this order and continue the tenancy by paying to the Landlord or to the LTB in trust:

- \$23,436.00 if the payment is made on or before December 31, 2022. See Schedule 1 for the calculation of the amount owing.

OR

- \$24,986.00 if the payment is made on or before January 31, 2023. See Schedule 1 for the calculation of the amount owing.
4. 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 January 31, 2023 but before the Court Enforcement Office (Sheriff) enforces the eviction. The Tenant may only make this motion once during the tenancy.
5. **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 January 31, 2023**
6. If the Tenant does not void the order, the Tenant shall pay to the Landlord \$20,571.03. 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 Landlord owes on the rent deposit are deducted from the amount owing by the Tenant. See Schedule 1 for the calculation of the amount owing.
7. The Tenant shall also pay the Landlord compensation of \$50.96 per day for the use of the unit starting December 6, 2022, until the date the Tenant moves out of the unit.
8. If the Tenant does not pay the Landlord the full amount owing on or before January 31, 2023, the Tenant will start to owe interest. This will be simple interest calculated from February 1, 2023, at 4.00% annually on the balance outstanding.
9. If the unit is not vacated on or before January 31, 2023, then starting February 1, 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 February 1, 2023.

December 16, 2022

Date Issued

Fabio Quattrociochi

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 August 1, 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 December 31, 2022

Rent Owing To December 31, 2022	\$23,250.00
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlord since the application was filed	- \$0.00
Less the amount the Tenant paid into the LTB since the application was filed	- \$0.00
Less the amount the Landlord owes the Tenant for an{abatement/rebate}	- \$0.00
Less the amount of the credit that the Tenant is entitled to	- \$0.00
Total the Tenant must pay to continue the tenancy	\$23,436.00

B. Amount the Tenant must pay to void the eviction order and continue the tenancy if the payment is made on or before January 31, 2023

Rent Owing To January 31, 2023	\$24,800.00
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlord since the application was filed	- \$0.00
Less the amount the Tenant paid into the LTB since the application was filed	- \$0.00
Less the amount the Landlord owes the Tenant for an{abatement/rebate}	- \$0.00
Less the amount of the credit that the Tenant is entitled to	- \$0.00
Total the Tenant must pay to continue the tenancy	\$24,986.00

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

Rent Owing To Hearing Date	\$21,954.80
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlord since the application was filed	- \$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	- \$1,550.00
Less the amount of the interest on the last month's rent deposit	- \$19.77
Less the amount the Landlord owes the Tenant for an {abatement/rebate}	- \$0.00

Less the amount of the credit that the Tenant is entitled to	- \$0.00
Total amount owing to the Landlord	\$20,571.03
Plus daily compensation owing for each day of occupation starting December 6, 2022	\$50.96 (per day)