



Tribunals Ontario

Landlord and Tenant Board

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

Citation: IMH POOL XV LP v Freake, 2022 ONLTB 13510

Date: December 6, 2022

File Number: LTB-L-017834-22_RV

In the matter of: 502, 85 SILVER SPRINGS BLVD
TORONTO, ON M1V 1W3

Between: IMH POOL XV LP Landlord

and

Kyle Freake Tenants
Shervin Tohidi

Review Order

IMH POOL XV LP (the 'Landlord') applied in a L1 application for an order to determine that Kyle Freake and Shervin Tohidi (the 'Tenants') did not pay the rent they owe, to terminate the tenancy, and to evict the Tenants.

The L1 application was heard by telephone/video-conference on October 11, 2022. The Landlord did not attend the L1 hearing.

On October 18, 2022 order LTB-L-017834-22 was issued determining that the Landlord had abandoned their L1 application. The Landlord's L1 application was therefore dismissed.

On October 21, 2022 the Landlord requested a review of order LTB-L-017834-22, alleging they were not reasonably able to participate in the L1 hearing held on October 11, 2022.

An interim order LTB-L-017834-22_RV_IN was issued on October 25, 2022 granting a hearing to determine whether or not the Landlord was reasonably able to participate in the L1 hearing.

The request for review was heard by telephone/video-conference on November 17, 2022. The Landlord's legal representative Sofia Enriquez attended the review hearing. The Tenant Shervin Tohidi attended the review hearing on behalf of both Tenants and spoke with tenant duty counsel before the review hearing started.

NOTE: This review hearing was heard together with another matter on the same docket (LTB-L-017854-22) involving different parties but the same legal representative for each respective landlord, since the reasons for the request and the claim of why the respective landlords were not reasonably able to participate were identical.

Determinations:

1. Ms. Enriquez submitted that on the morning of October 11, 2022, their office experienced an IT problem which shut down the entire server, preventing anyone from accessing any files in their computer system regarding any tenancies, LTB applications, or hearings.
2. When I asked for more details about whose office had experienced the IT problem, Ms. Enriquez advised that the server at their Toronto office had been shut down. She advised that she worked as a paralegal for Secci. She was unable to answer whether Secci was an independent contractor or firm hired by IMH POOL XV LP, or if Secci was an in-house legal department of the Landlord. She confirmed that Secci's head office was in Toronto and this is where the IT problem had occurred. Ms. Enriquez advised that Secci did legal work for many different landlords including IMH POOL XV LP and the landlord on the companion file (Metcap) heard together with this one from the same docket. She confirmed that IMH POOL XV LP had a different office address (as per the L1 application) compared to Secci and that no internet or router/server issues had occurred at the Landlord's office.
3. Ms. Enriquez submitted that since none of the documents or files could be accessed during the IT shut down which started October 11, 2022, the Landlord was not reasonably able to attend any hearings which occurred during this time.
4. Ms. Enriquez submitted that all paralegals such as herself were working remotely. She submitted that the IT problem was an unforeseen event. She advised that the IT server problem lasted several days. Between October 11 to 13, 2022, the server was almost completely inaccessible. From October 14, 2022 onwards access to the server was patchy. Eventually all legal staff received a memo from their boss that the router would be replaced. She was not sure exactly which day the IT issue was completely resolved.
5. When questioned further, Ms. Enriquez advised that she had not been the legal representative assigned to this particular L1 hearing or file. A colleague of hers had carriage over this file on October 11, 2022. Thus, Ms. Enriquez could not answer any questions about what specifically the Landlord's legal representative for the L1 hearing attempted to do to try to attend the L1 hearing, when they realized the IT system was inaccessible on October 11, 2022.

6. Ms. Enriquez further submitted that all legal staff had received a memo from their boss that a request for review should be submitted for all matters where a LTB hearing was missed during the IT problem.
7. Ms. Enriquez advised that there was proof a serious IT problem had occurred. A document submitted with the request for review showed that Jack Bryan of Secci had sent an email on October 14, 2022 to himself, forwarding an email where Johny Lyngdoh (Manager of gtt) had emailed Steve Chadee about a failure of the GTT main network in the region which caused an outage. Ms. Enriquez explained that Jack Bryan was her boss, and Steve and Lohny had been in contact with him about the IT problem. I did not give much weight to this email because none of the people involved (Jack, Johny, Steve) attended the review hearing to qualify the accuracy of the emails. Although I am able to accept hearsay evidence, in this situation the legal representative was not entirely sure about the date of the email between Johny and Steve (ie: that it occurred on October 11, 2022 the date of the L1 hearing in question), nor about the relationship and roles of all people involved other than knowing Jack was her boss.
8. Despite the hearsay email evidence, I accept based on Ms. Enriquez's submissions that there was a router problem at Secci on the day of the L1 hearing.
9. Ms. Enriquez was unable to answer any questions about the setup of IMH POOL XV LP versus Secci, whether file information was shared between the Landlord and Secci (ie: data about tenancy files, information about LTB applications and hearings), nor did she have any knowledge about any backup methods used by the Landlord such as using iCloud, etc. She testified that since working here, this event was unprecedented and unexpected. It was her first time experiencing such an IT issue.
10. Ms. Enriquez advised that the Landlord IMH POOL XV LP operates "a lot" of tenancies – she estimated it was over 50 rental units. She speculated that several hearings had been missed by IMH POOL XV LP and that requests for review had likely been submitted by her colleagues for all those matters which were missed between October 11-14, 2022.
11. Ms. Enriquez testified that legal representatives like herself had been well prepared for the L1 hearings scheduled for October 11-14, 2022, but that due to the IT outage which was out of their control, they were unable to access any files or documents to have the opportunity to attend the hearings.
12. Ms. Enriquez submitted that most legal staff and her colleagues were all working remotely. They relied heavily on the internet, electronic/virtual systems, and the server at Secci to access the computer system. All information about

hearings were inputted into an Excel spreadsheet, and all evidence/submissions for applications were housed in the system.

13. Ms. Enriquez advised that due to the sensitive nature of the information in files, no individual backup could be made by legal representatives such as herself. All hearing or file information could only be accessed online through the system.
14. Ms. Enriquez confirmed that the Landlord had received the Notice of Hearing for the October 11, 2022 L1 hearing, and there were no submissions that notice was not properly received.
15. I note that the Board's file contained mailing certificates from our staff that the Notice of Hearing for the L1 application was served to all parties several weeks prior to the hearing.

Findings

16. Based on the evidence in the Board's file, as well as the evidence presented by the Landlord's legal representative, I find that the Notice of Hearing package was properly given by the Board to the Applicant/Landlord, using a mode of communication sanctioned by the Landlord in their L1 application. The legal representative confirmed there had been no issue with receiving the Notice of Hearing for the L1 application.
17. The Landlords' legal representative submitted that there was a clear intention for the Landlord to participate in the L1 hearing, but they were not given the opportunity to do so due to the unforeseen IT problem that occurred in the Secci head office.
18. I disagree that the Landlord demonstrated a genuine intention to participate in the L1 proceedings. Although Divisional Court requires that the LTB interpret a genuine intention to participate broadly, in this case there was no evidence to show the Landlord did anything to try to participate in the proceedings. Simply filing an L1 application and paying a filing fee is not evidence of a genuine intention to participate in the proceedings. On the morning of the hearing, when the IT problem was first detected, there were several hours of opportunity where the Landlord or their legal representative could have done any number of things to try to attend the hearing. For example, the dismissal order notes the hearing Member waited until after 5pm on October 11, 2022, before calling this matter. Since the legal representative with carriage over the L1 file did not attend the review hearing, I had no evidence what steps, if any, were taken to try to attend the hearing. For example, the Landlord or the legal representative could have looked up the main number for the LTB, called customer service, and asked for the file number and hearing room access for this hearing. The Landlord could have asked for their PIN access for the LTB portal system or emailed the Board regarding the IT outage. An adjournment could have been sought if the

evidence/ledger/submissions for the L1 application were inaccessible in the Secci server system. The Landlord could have tried to contact the Tenants to seek a rescheduling of the applications or to seek Zoom or telephone hearing access information.

19. To the contrary, instead of demonstrating any genuine intention to participate on October 11th, it seems a business/management decision was made by IMH POOL XV LP and/or Secci, to simply circulate a memo to all paralegals to submit requests for review on all their missed hearings during October 11-14 which occurred during their router problems.
20. Further, it seems the paralegals did not even know which files or hearings were occurring on October 11, 2022. Without access to the computer system, the legal representatives working for IMH POOL XV LP could not see what files were being heard that day. This was a business decision made by the Landlord and/or Secci which could have been easily countered by handwriting in a calendar the file number, date of hearing, etc. If these companies decided to write nothing down or print anything in hard copy, or have any backup method for saving data, it seems they were ill-prepared for any potential internet or server disruptions such as what occurred with the router on October 11, 2022.
21. Regardless of the relational and informational setup between IMH POOL XV LP and Secci, it is undisputed that the Landlord was given proper notice by the Board about the L1 hearing scheduled for October 11, 2022. Whether hearing information was inputted into an Excel spreadsheet and file information was only accessible through the Secci server - is a business decision made by the Landlord. There was no evidence whether IMH POOL XV LP (whose office was a different location than Secci and whose server was not affected) had independent access to LTB file information. If the Landlord failed to consider any backup method, or if the Landlord passed all legal matters onto Secci without keeping any LTB file information for themselves in their own system, or if individual paralegals failed to write down pertinent information such as hearing dates, the telephone number or link to access Zoom, etc. – these were all business decisions made IMH POOL XV LP and/or Secci.
22. As large a landlord as IMH POOL XV LP is (over 50 rental units estimated by Ms. Enriquez), a reasonable corporate landlord would have had some method of backup to anticipate catastrophic internet or IT power outages. The world is now nearly 3 years into a COVID19 pandemic, where businesses have pivoted to virtual/digital access. It is unreasonable for a large corporate landlord or legal department to have no processes or backup systems to anticipate or deal with virtual, internet, or IT system challenges.
23. On a balance of probabilities, I am not satisfied that the Landlord was not reasonably able to participate in the L1 hearing held on October 11, 2022. I find that based on the testimony and evidence, it is more likely than not, that the

Landlord failed to exercise due diligence with respect to their L1 application and the Board's proceedings.

24. In fact, it seems from the submissions of Ms. Enriquez, that the company/companies (IMH, Secci) did nothing to try to genuinely participate, and simply made a business decision to circulate a memo to all paralegals that any matters missed during their IT problem (Oct 11 – 14, 2022) would all have requests for reviews submitted.
25. It also appears that there was a lack of responsibility and communication between the Landlord and Secci regarding information about LTB hearings. This lack of communication and lack of doing anything proactive on October 11, 2022 to try to attend or adjourn the L1 hearing was overall a lack of due diligence on the Landlord's part.
26. A lack of due diligence is not grounds to grant a request for review. This has been confirmed by the Courts in *Q Res IV Operating GP Inc. v. Berezovs'ka*, 2017 ONSC 5541 CanLII (Div. Ct.) paragraph 8 which states:

If parties are not diligent in dealing with legal proceedings then they cannot demand that a Tribunal waste its resources by rehearing matters a second time. To allow this would undermine the ability of the administration of justice to deliver timely, cost-effective and final orders.
27. I further note that it would be prejudicial to allow this review. The Tenants originally received a dismissal order for the L1 application. If the Board were to allow the Landlord a *de novo* L1 hearing, the Tenants would potentially face eviction and an order for rent arrears, which is prejudicial to the Tenants when originally, due to no fault of their own, the Landlord missed their L1 hearing.
28. The Landlord is essentially asking the Board to expend more resources, give another chance to seek their remedies, and potentially prejudice the Tenants - due to the consequences of their own business decision to pass all responsibility regarding this rental unit, their L1 application, and anything to do with the hearing, onto their legal department or contractor Secci.
29. The Landlord is also asking the Board to shoulder the cost of failing to have alternative methods of backup, data storage, or file information accessible to their legal representatives.
30. Section 183 of the *Residential Tenancies Act, 2006* requires the Board to adopt the most expeditious method of determining the questions arising in a proceeding that affords all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter. I find it would be neither fair nor expeditious to allow the Landlord another chance to have their L1 hearing re-heard.

31. Based on the above testimony and evidence – especially the legal representative’s acknowledgment that the Landlord received the Notice of Hearing package, and no evidence from the legal representative who had carriage over this L1 application that they tried to participate in the proceedings - the Landlord is not entitled to have their L1 application re-heard because they failed to exercise due diligence. Therefore, the request to review is denied.

It is ordered that:

32. The request to review order LTB-L-017834-22 issued on October 18, 2022, is denied. The order is confirmed and remains unchanged.
33. The interim order LTB-L-017834-22_RV_IN issued on October 25, 2022 is cancelled.

December 6, 2022
Date Issued

Michelle Tan
Member, 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.