



## Order under Section 69 Residential Tenancies Act, 2006

**Citation:** Feng v Samari-Kermani, 2022 ONLTB 10935

**Date:** 2022-11-04

**File Number:** LTB-L-006660-22

**In the matter of:** 6 DEGRAAF CRES  
AURORA ON L4G0X3

**Between:** Yi Feng Landlord

**And**

Foroogh Samari-Kermani Tenants  
Mohammad Samari-Kermani

Yi Feng (the 'Landlord') applied for an order to terminate the tenancy and evict Foroogh Samari-Kermani (FSK), Mohammad Samari-Kermani (MSK) (the 'Tenants') because the Tenants did not pay the rent that the Tenants owe.

This application was heard by videoconference on August 16, 2022.

Only the Landlord's Legal Representative H. Zhou and the Landlord attended the hearing.

As of 10:42 a.m., the Tenants were not present or represented at the hearing although properly served with notice of this hearing by the LTB. There was no record of a request to adjourn the hearing. As a result, the hearing proceeded with only the Landlord's evidence.

**Determinations:**

1. The Landlord served the Tenants with a valid Notice to End Tenancy Early for Non-payment 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 \$3,300.00. It is due on the 29th day of each month.
4. Based on the Monthly rent, the daily rent/compensation is \$108.49. This amount is calculated as follows: \$3,300.00 x 12, divided by 365 days.
5. The Tenants have not made any payments since the application was filed.
6. The Landlord incurred costs of \$186.00 for filing the application and is entitled to reimbursement of those costs.
7. There is no last month's rent deposit.

8. 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 Tenants and find that it would be unfair to grant relief from eviction pursuant to subsection 83(1) of the Act for the following reasons.

### Arrears

9. This application was filed on February 3, 2022 seeking payment of arrears and termination of the tenancy. On March 25, 2022, MSK filed for bankruptcy.
10. As of March 25, 2022, the Tenants owed \$19,800.00 in arrears for December 2021, and January, February and March 2022 rent.
11. All arrears owing by MSK up to March 25, 2022 are “a claim provable in bankruptcy” (see *Global Royalties Limited v David Brook*, 2015 ONSC 6277) and subject to a stay pursuant to section 69.3(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 (the “BIA”). Rent arrears owing to March 25, 2022 by MSK must be pursued through the bankruptcy trustee and cannot be collected or enforced through a proceeding under the Act.
12. Arrears owing after the date MSK filed for bankruptcy (for April, May, June, July, and August 2022) are not subject to the BIA stay and can be awarded by the Board (\$3,300.00 x 5= \$16,500.00). Since the date of the hearing a further three months’ rent have become owing. The Tenants therefore owe \$26,400.00 in arrears for the period from March 25, 2022 through November 30, 2022.

### Tenant FSK

13. In a joint tenancy, there is a single tenancy agreement, and the tenants are jointly and severally (individually) liable for the payment of the entire rent for the rental unit. By contrast, in the case of a tenancy-in-common, although there may be a single tenancy agreement document and while all the tenants may occupy the same premises, each tenant-in-common has a separate tenancy with the landlord. Each tenant in common is individually responsible for the payment of his or her share of the rent for the rental unit.
14. Section 13 of the *Conveyancing and Law of Property Act*, R.S.O., 1990, c. C.34, provides that there is a presumption in favour of a tenancy in common “unless an intention sufficiently appears on the face of the letters patent, assurance or will that they are to take as joint tenants,” even where the tenants are spouses. A joint tenancy requires four elements: unity of title, time, interest, and possession. In other words, the tenants must take possession under the same tenancy agreement, they must have entered into the tenancy agreement at the same time, they must each take the same estate, and each must take possession of the undivided whole of the premises (that is no joint tenant must exclude another joint tenant from any part of the property).
15. At common law, the classic example of a joint tenancy is a property owned by two spouses. The spouses do not typically own percentages of the property, rather they share ownership of the entire property. In the context of the Act, an important feature of a joint tenancy is that the co-tenants do not have separate shares of the rent. They are jointly and severally liable to the landlord for the entire rent, meaning that if the rent is not paid, the

landlord may pursue any of them for the full amount. The Board has consistently held joint tenants to be jointly and severally liable for the whole rent because the tenants share an interest the entire tenancy rather than holding partial shares of it.

16. The determination of the nature of any particular tenancy, whether a joint tenancy or a tenancy in common, will depend upon the Board's finding of fact in each case, which includes the Board's determination under s. 202(1) of the Act of the real substance of the transactions and activities relating to the rental unit.
17. The Tenants did not attend the hearing, and it is the uncontested evidence of the Landlord that the Tenants are both on the lease and are spouses. It is his understanding that they equally shared the rental unit and jointly paid rent. I find that on the evidence presented it is more likely than not that the Tenants are joint tenants.
18. FSK did not declare bankruptcy and therefore her obligation to pay rent was not stayed by the BIA. As a joint tenant she is liable for the entire amount of arrears owing to the date of the bankruptcy. She is also liable, jointly with MSK, for arrears owing from the date of the bankruptcy to the date of the hearing. (see *Edward v. Niagara Neighbourhood Housing Co-Operative Inc.*, 2006 CanLII 16485 (“*Edward*”), where one member (tenant) spouse declared bankruptcy and the other was ordered to pay full arrears owing pre-and post-filing.)

#### Termination of the Tenancy

19. The current application, as discussed above, was filed on February 3, 2022, which predated the bankruptcy filing. The Landlord is claiming arrears that accumulated both pre-filing and post-filing. Only part of the claim is stayed by the BIA. Under section 84.2(2) of the BIA, the Landlord cannot terminate the tenancy based on any arrears owing to the date of the bankruptcy.
20. In *Edward*, the Landlord (Co-operative association) evicted the Edward family due to failure to pay monthly housing charges after the date of the bankruptcy filing and this was upheld on appeal to a general meeting of the members. This situation, although involving a Co-operative and governed by the bylaws and the *Co-operative Corporations Act, R.S.O. 1990*, is analogous to the current application. The Co-operative started the application initially seeking to recover the entire amount of the arrears, some of which were, unbeknownst to the Co-operative, subject to the stay imposed by s. 69.3. The Co-operative then learned of the problem associated with part of its claim for arrears in rent. Its response was to continue the proceeding and seek relief (termination and arrears) only in relation to the post-bankruptcy arrears.
21. Under s. 201(1)(f) of the Act, the Board may, “on its own motion and on notice to the parties, amend an application if the Board considers it appropriate to do so and if amending the application would not be unfair to any party.”
22. The Board’s Interpretation Guideline 13 specifies that a Member can do so before, during or after a hearing. Factors to be considered include:
  - Any prejudice a party may experience as a result of the amendment
  - Whether the amendment is necessary

- Any other relevant factors

23. I am satisfied for the reasons that follow that it is appropriate and not unfair to any party to amend the application on my own motion to seek relief only for the post-filing period. As I have the authority under the Act to order payment of post-filing arrears, it logically follows that I have the authority to provide for enforcement of payment of these arrears.
24. I must consider the balancing of the parties' interests and fairness to both parties. The N4 Notice was not voided, and post-filing arrears accrued. The potential prejudice to the Tenants by making the amendment is balanced by the fact that the Tenants were on notice when served with the application (prior to the bankruptcy filing) that the Landlord was seeking to evict them on the basis of the arrears. Amending the application to specify that termination of the tenancy is only sought on the post-filing arrears does not "surprise" the Tenants with the possibility of eviction based on arrears.
25. In *Edward*, the Divisional Court upheld the hearing decision (which led to authorization for eviction) that:

The claims for pre-bankruptcy liabilities are subject to the stay. There is no way the Co-op can be forced to continue to grant credit... While I have every sympathy for Mr. Edward, this matter must come to a stop so that the members of the Co-op will not be liable for even more money, arrears now totaling over \$10,000.00.

26. I find that the amendment is necessary to protect the interests of the Landlord. He should not be "forced to continue to grant credit." I am concerned with the mounting post-filing arrears, which are high. The Landlord testified that the rental unit is a private home and that he is paying a mortgage while the Tenants have lived in the unit, made no payments, and paid no rent at all for 9 months to the date of the hearing. The Landlord testified that he had attempted negotiations with the Tenants, including a payment plan, and that the Tenants informed him that they had "no money," and "can't pay." The Tenants did not attend the hearing to provide the Board with any submissions.
27. Under a regular analysis of s. 83 factors when considering whether it is appropriate to order termination of a tenancy, this would clearly be an instance when termination was appropriate. The Tenants are currently living rent-free while the Landlord is severely financially prejudiced. It would be manifestly unfair to permit this to continue, and therefore I therefore find that it is appropriate to amend the application to claim relief by ordering payment of the post-filing arrears and termination of the tenancy if those arrears are not paid.

**It is ordered that:**

1. The tenancy between the Landlord and the Tenants is terminated unless the Tenants void this order.
2. **The Tenants may void this order and continue the tenancy by paying to the Landlord or to the LTB in trust:**

- \$26,586.00 if the payment is made on or before November 15, 2022 (less any payments that the Tenants have made since the date of the hearing). See Schedule 1 for the calculation of the amount owing.
3. The Tenants may also make a motion at the LTB to void this order under section 74(11) of the Act, if the Tenants have paid the full amount owing as ordered plus any additional rent that became due after November 15, 2022 but before the Court Enforcement Office (Sheriff) enforces the eviction. The Tenants may only make this motion once during the tenancy.
  4. **If the Tenants do not pay the amount required to void this order the Tenants must move out of the rental unit on or before November 15, 2022.**
  5. If the Tenants do not void the order, the Tenants shall pay to the Landlord \$15,447.37 (less any payments that the Tenants have made since the date of the hearing). 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 Tenants shall also pay the Landlord compensation of \$108.49 per day for the use of the unit starting August 17, 2022 until the date the Tenants move out of the unit.
  7. If the Tenants do not pay the Landlord the full amount owing on or before November 15, 2022, the Tenants will start to owe interest. This will be simple interest calculated from November 16, 2022 at 4.00% annually on the balance outstanding.
  8. If the unit is not vacated on or before November 15, 2022, then starting November 16, 2022, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
  9. 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 November 16, 2022.
  10. The Tenant Forough Samari-Kermani shall also pay to the Landlord the amount of \$19,800.00 for arrears of rent from December 2021 to March 2022.
  11. If the Tenant Forough Samari-Kermani does not pay the Landlord the full amount owing in paragraph 10 by November 15, 2022, the Tenant will start to owe interest. This will be simple interest calculated from November 16, 2022 at 4.00% annually on the balance outstanding.

**November 4, 2022**  
**Date Issued**

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Margo den Haan  
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 May 16, 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 Tenants must pay to void the eviction order and continue the tenancy if the payment is made on or before November 15, 2022**

Rent Owing To November 28, 2022 (less any payments that the Tenants have made since the date of the hearing)	\$ 26,400.00
Application Filing Fee	\$186.00
NSF Charges	\$0.00
<b>Less</b> the amount the Tenants paid to the Landlord since the application was filed	- \$0.00
<b>Less</b> the amount the Tenants paid into the LTB since the application was filed	- \$0.00
<b>Total the Tenants must pay to continue the tenancy</b>	<b>\$ 26,586.00</b>

**B. Amount the Tenants must pay if the tenancy is terminated**

Rent Owing To Hearing Date	\$15,261.37
Application Filing Fee	\$186.00
NSF Charges	\$0.00
<b>Less</b> the amount the Tenants paid to the Landlord since the application was filed	- \$0.00
<b>Less</b> the amount the Tenants paid into the LTB since the application was filed	- \$0.00
<b>Less</b> the amount of the last month's rent deposit	- \$0.00
<b>Less</b> the amount of the interest on the last month's rent deposit	- \$0.00
<b>Total amount owing to the Landlord</b>	<b>\$15,447.37</b>
Plus daily compensation owing for each day of occupation starting August 17, 2022	\$108.49 (per day)