



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

DECISION

Dispute Codes: OPR, MNR and FF

This application was brought by the landlord seeking an Order of Possession pursuant to a 10-day Notice to End Tenancy for unpaid rent dated December 9, 2008 and effective December 22, 2008. The landlord also sought a Monetary Order for the unpaid rent and filing fee for this proceeding.

The landlord applicant appeared and an individual representing the tenant appeared stating that the tenant was at work and could not participate. The tenant's representative requested an adjournment for the hearing to a date when the tenant was available.

Preliminary Issue(s)

The representative of the tenant initiated a request for adjournment on the basis that the tenant wanted to participate to give testimony regarding the Notice to End Tenancy and the rental arrears issue to defend against the landlord's application. The representative pointed out that the tenant had received the application and Notice of Hearing package and then sent an email to the landlord outlining the tenant's circumstances and proposing a payment plan. The tenant's representative testified that in response to the email, the landlord indicated that it would accept payment based on "use and occupancy only" and that the landlord would still be seeking an order to end the tenancy. The representative testified that the tenant had sought advice from the

tenant's MLA and from the Residential Tenancy Branch and was directed to request an adjournment at the hearing. Consideration for an adjournment was given pursuant to the Act.

Analysis – Respondent's Request for Adjournment

Rule 6.1 of the Rules of Procedure states that the Residential Tenancy Branch will reschedule a dispute resolution proceeding if *“written consent from both the applicant and the respondent is received by the Residential Tenancy Branch before noon at least three (3) business days before the scheduled date for the dispute resolution proceeding.”*

Proceedings can be adjourned in some cases, after the hearing has commenced. However, the Rules of Procedure contain a mandatory requirement that the Dispute Resolution Officer must look at the oral or written submissions of the parties and; 1) consider whether the purpose for which the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1 [objective and purpose]; 2) consider whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether a party had sufficient notice of the dispute resolution proceeding; 3) weigh the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and 4) assess the possible prejudice to each party.

In this instance, the landlord's application was submitted and served on each one of the respondents by registered mail sent on January 10, 2009 and Canada Post records indicate that the Notice was successfully delivered to the tenant on January 13, 2009. I determined that the tenant/respondent had been provided with adequate time to make evidentiary submissions prior to the hearing and I note that no evidence had been received that would verify that all of the rental arrears were paid by the tenant within the period required under the Act to cancel the notice.

I found that any verbal testimony that the tenant would have provided, had the tenant appeared, did not relate to the key matter of whether or not any rent was owed. In regards to this application, the only defence that could have thwarted a decision granting an Order of Possession would be written proof, submitted into evidence in advance of the hearing to prove that all of the rental arrears owed were completely paid within five days of receiving the Ten-Day Notice to End Tenancy back in December 2008. However, both the landlord and the representative of the tenant agreed that rental arrears existed beyond the five-day deadline and still do exist. I found that verbal testimony about the tenant's circumstances, or the reasons for non-payment and the tenant's proposal for a payment plan certainly could have been discussed in more detail during the hearing had the tenant been present, but that this testimony would not function as a defence against the landlord's application for an Order of Possession based on a notice issued under section 46 of the Act.

Given the above, in considering whether the adjournment was required to provide a fair opportunity for a party to be heard, I found that the party had sufficient notice of the dispute resolution proceeding and had a reasonable opportunity to submit into evidence, proof of payment of the arrears. In considering whether the purpose for which the adjournment was being sought would contribute to the resolution of the matter I found that it would not. In assessing the possible prejudice to each party, I note that the Notice to End Tenancy was served on the tenant in December 2008 and it is now the second week of February 2009. It is clear that delaying the hearing further, would be unfairly prejudicial to the applicant.

Accordingly, I found that there was not sufficient justification under the Act and Rules of Procedure to support imposing an adjournment on the other party and the respondent's request for an adjournment was denied.

Issue(s) to be Decided

The landlord was seeking an Order of Possession and a monetary order for rental arrears. The issues to be determined based on the testimony and the evidence are:

Whether or not the landlord is entitled to an Order of Possession based on the 10-Day Notice to End Tenancy for Unpaid Rent and

Whether or not the landlord is entitled to monetary compensation for rental arrears owed and loss of rent. These determinations require answers to the following questions:

- Did the tenant receive a valid 10-Day Notice to end Tenancy for Unpaid Rent?
- Did the tenant pay the rental arrears in full within five days of receiving the Notice?
- Was the tenancy subsequently re-instated by the parties?

Background and Evidence

The landlord submitted into evidence a copy of proof of service of the Notice of Hearing, a copy of the 10-Day Notice to End Tenancy for Unpaid Rent dated December 9, 2008 with effective date of December 22, 2008, proof of service of the Ten-Day Notice, a copy of the tenancy agreement, a copy of the tenant's rental statement, a copy of an agreement to pay rent arrears dated August 21, 2008 and a copy of a previous Notice to End Tenancy for Unpaid Rent dated November 13, 2008. The landlord testified that the tenant paid \$400.00 on December 31, 2008, \$1,000.00 on January 21, 2009 and \$700.00 on February 2, 2009. The landlord testified that these payments were accepted on a "use and occupancy" basis only and that the current amount of arrears was \$2,423.00. The landlord testified that previous attempts in the past to implement a repayment plan were unsuccessful and the landlord stated that it is not willing enter into any more agreements of this nature. The landlord was seeking an Order of Possession

effective February 28, 2009 and a monetary order for \$2,423.00 for rental arrears still outstanding.

The tenant's representative acknowledged that rent was still owing, but stated that on Friday February 6, 2008, the tenant paid an additional \$1,300.00 towards the arrears owed. The representative testified that the tenant had sent the landlord an explanation and a payment plan and also contacted an MLA's office but the representative also acknowledged that the tenant did not pay all of the outstanding arrears in December 2008, within five days of receiving the 10-Day Notice to End Tenancy for Unpaid Rent and did not make a formal application for Dispute Resolution to dispute the Notice within five days of receiving it. The tenant's representative testified that the tenant had lived in the complex for 30 years and had no way of understanding her rights and responsibilities under the Act. The representative stated that, whether or not the tenant read the information on the 10-Day Notice instructing the tenant and outlining the consequences for failing to pay the arrears in rent, was not known. The tenant's representative offered significant testimony regarding the tenant's personal circumstances, background and state of health.

Analysis

Based on the evidence and the testimony of both parties, I find that the tenant was served with a Notice to End Tenancy for Unpaid Rent. The tenant failed to pay all of the outstanding rent and did not make application to dispute the Notice within five days of receiving the Notice. Under section 46(5) of the Act, the tenant is therefore conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice, which in this instance was December 22, 2008. Based on the above facts I find that the landlord is entitled to an Order of Possession under the Act.

I accept the defence put forward by the tenant's representative that the tenant was doing everything she could to catch up and that the tenant had made contact with the landlord by email detailing the tenant's circumstances and intentions to pay. However,

even if true, these facts would not suffice to impact a determination regarding a Notice for unpaid rent. Section 26 (1) of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement. The reasons for the tenant's failure to do so would not be material to the critical question. I note that in the past the landlord had extended an opportunity to the tenant to make arrangements to catch up on rental arrears, despite the fact that there no provision in the Act that compels a landlord to continue a tenancy nor negotiate a payment plan. This arrangement was not successful in the past and the landlord is not interested in pursuing any further negotiations but was seeking the end of this tenancy. In this situation the landlord was within its rights under the Act to request an Order of Possession on a date set by the landlord. The landlord requested an effective date of February 28, 2009 and I order that the tenancy will end at that time.

I find that the landlord has established a total monetary claim of \$2,473.00 comprised of \$2,423.00 accrued rental arrears and the \$50.00 fee paid for this application. The landlord has made a commitment to take into account any additional payments that have or will be made, in enforcing this order against the tenant.

Conclusion

I hereby issue an Order of Possession in favour of the landlord effective at 1:00 p.m. on Saturday February 28, 2009. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

I hereby grant the landlord a monetary order under section 67 for \$2,473.00. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

February, 2009

Date of Decision

Dispute Resolution Officer